SUPREME COURT OF THE UNITED STATES.

October Term, 1894.

No. 1,

CHARLES S. H. DEXTER, APPELLANT,

vs.

WILLIAM TRACEY, UNITED STATES MARSHAL FOR AND FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLANT.

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Supreme Court of the United States,

OCTOBER TERM, 1900.

No. 387.

CHARLES F. W. NEELY, Appellant,

vs.

WILLIAM HENKEL, United States Marshal in and for the Southern District of New York.

BRIEF FOR THE APPELLANT.

Statement.

This is an appeal from a final order of the Circuit Court of the United States in and for the Southern District of New York, entered August 9, 1900, denying the appellant's application for a writ of *habeas corpus*, whereby he sought to obtain his release from the custody of the appellee, who then held and still detains him under certain warrants issued by Hon. E. Henry Lacombe, Circuit Judge in the Second Circuit, in proceedings instituted under the Act of June 6, 1900 (31 Stat., 656), which undertakes to authorize extradition to Cuba.

The Act is as follows:

> "AN ACT AMENDING SECTION FIFTY-TWO HUNDRED AND SEVENTY OF THE REVISED STATUTES OF THE UNITED STATES.
>
> *Be it enacted by the Senate and House of Representatives of the United States of Amer-*

ica, in Congress assembled, That Section Fifty-two Hundred and Seventy of the Revised Statutes of the United States is hereby amended by adding thereto the following proviso:

"*Provided,* that whenever any foreign country or territory, or any part thereof is occupied by or under the control of the United States, any person who shall violate, or who has violated, the criminal laws in force therein, by the commission of any of the following offenses, namely: Murder and assault with intent to commit murder; counterfeiting or altering money, or uttering or bringing into circulation counterfeit or altered money; counterfeiting certificates or coupons of public indebtedness, bank notes, or other instruments of public credit, and the utterance or circulation of the same; forgery or altering, and uttering what is forged or altered; embezzlement or criminal malversation of the public funds, committed by public officers, employees, or depositaries; larceny or embezzlement of an amount not less than one hundred dollars in value; robbery, burglary, defined to be the breaking and entering by night time into the house of another person with intent to commit a felony therein, and the act of breaking and entering the house or building of another, whether in the day or night time, with the intent to commit a felony therein; the act of entering or of breaking and entering the offices of the Government and public authorities, or the offices of banks, banking-houses, savings banks, trust companies, insurance or other companies, with the intent to commit a felony therein; perjury or the subornation of perjury; rape; arson; piracy by the law of nations; murder, assault with intent to kill, and manslaughter, committed on the high seas, on board a ship owned by or in control of citizens or residents of such foreign country or territory and not under the flag of the United States, or of some other government; malicious destruction of or attempt to destroy railways, trams, vessels, bridges, dwellings, public edifices, or other buildings, when the act endangers human life, and who shall depart or flee, or who has de-

parted or fled, from justice therein to the United States, or to any Territory thereof, or to the District of Columbia, shall, when found therein, be liable to arrest and detention by the authorities of the United States, and on the written request or requisition of the military governor or other chief executive officer in control of such foreign country or territory shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offense was committed. All the provisions of sections fifty-two hundred and seventy to fifty-two hundred and seventy-seven of this Title, so far as applicable, shall govern proceedings authorized by this proviso: *Provided further*, that such proceedings shall be had before a judge of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged.

And provided further that no return or surrender shall be made of any person charged with the commission of an offense of a political nature.

If so held such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the Secretary of State of the United States, and such authorities shall secure to such a person a fair and impartial trial."

Section 5270 of the Revised Statutes establishes a system for the provisional arrest and commitment of persons subject to extradition under treaties between the United States and other powers, pending the action of the Secretary of State.

The section formerly read as follows:

> "Whenever there is a treaty or convention for extradition between the Government of the United States and any foreign government, any Justice of the Supreme Court, Circuit Judge, District Judge, Commissioner, authorized so to do by any of the courts of the United States, or judge of a court of record, of general jurisdiction of any State, may, upon complaint made under oath, charging

> any person found within the limits of any state, district or territory with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge or commissioner, to the end that the evidence of criminality may be heard and considered. If, on such hearing, he deems the evidence sufficient to sustain the charge under the provisions of the proper treaty or convention, he shall certify the same, together with a copy of all the testimony taken before him, to the Secretary of State, that a warrant may issue upon the requisition of the proper authorities of such foreign government for the surrender of such person, according to the stipulations of the treaty or convention; and he shall issue his warrant for the commitment of the person so charged to the proper jail, there to remain until such surrender shall be made."

The intention of the amendatory act was to provide a means for the extradition to Cuba of persons there charged with criminal offenses, so long as Cuba should be "occupied by or under the control of the United States," that is to say, so long as that Island should be governed by the United States.

Its constitutionality is challenged by the appellant upon the ground, broadly stated, that there is no authority in the Constitution for the government by the President, in time of peace, of friendly foreign territory; that as the act is obviously an attempt on the part of Congress to aid and support the President in the maintenance in Cuba of a government unwarranted by the Constitution, and in the administration of which the President assumes to deny to persons accused of crime the ordinary rights and safeguards guaranteed by the Constitution, the appellant's detention is in violation of the Constitution and of his rights, privileges and immunities thereunder.

BRIEF ON THE FACTS.

I.

Of the attitude of the United States towards Spain during the late civil war in Cuba, the incidents which led to our intervention and our relations with the Cuban people subsequent to that event.

While this Court needs no enlightenment as to the causes which led up to the recent war, or the incidents of that war, there are certain features in the relations of our Government to the conflict, illustrative of the attitude in which we were placed by the ultimate intervention of the United States, which may have a bearing upon the legal questions involved in this case. We, therefore, venture to point out some of the more important events preceding the war, the nature and magnitude of the rebellion in Cuba, the existence of which and the incidents resulting from which, occasioned our intervention, and the character and result of our subsequent participation in the conflict; and particularly to invite attention to the relations existing between the Government of the United States and the Cuban people, not alone at the time when, as we shall endeavor to show, their independence was acknowledged by the President, but before then, as well as throughout the ensuing hostilities, down to the present time.

These facts having been considered, we shall present the question, of first importance in this case, as to the legality, under our Constitution, of the establishment and maintenance in Cuba of the rule, to the jurisdiction of which the Act of June 6, 1900, seeks to subject the appellant.

While many facts to which we shall refer do not appear in the printed record, they are all matters of public history of which this Court will take notice. Moreover, they can all be substantiated by reference to the Government archives.

Our object in preliminarily reviewing these historical facts is to demonstrate beyond any question the accuracy of our primary contention, that there never has been any occasion or warrant in public law, or under the Constitution of the United States, for the American occupation or control of the Island of Cuba, since that Island has never been "enemy country," or in any sense "hostile territory," and was never *invaded* or *conquered* by the United States forces. We shall show that by the forcible intervention of the United States in the war between Spain and the Cuban insurgents the United States became the ally of the latter, whose freedom and independence the United States Government had solemnly recognized, and the *fact* of whose absolute freedom and independence the President, by approving the joint resolution of April 20, 1898, and by other executive acts plainly evidencing his intention in that regard, had conclusively established; that the conflict thereafter became, not a war between the United States and Spain, but a joint war between the allied forces of the United States and of the free people of Cuba on the one part, and of Spain on the other; that throughout our troops and our fleets sought and received the assistance and co-operation of the Cuban military forces; that there was systematic, preconcerted, joint action between them at all times, and that when peace was brought about, the victors were the United States and Cuba, not the United States alone.

It will further appear, whatever may be said of the treaty stipulations whereby the war was ended, that Congress has at all times appreciated our true

relations and attitude toward the Cuban people, and has by various acts of positive legislation manifested its recognition of the character of those relations, and, above all, that the Cuban people are and have been a friendly foreign sovereign power at all times since the political branch of our Government determined the fact of their independence.

If we are correct in these assumptions, we shall contend that neither the principles of public law, nor any power conferred upon the President by the Constitution, afford any authority or justification for the rule now maintained in Cuba or for the methods there employed in the administration of criminal justice, and that Congress, in enacting the Act of June 6, 1900, which seeks to subject the appellant to a criminal prosecution under that rule and by those methods, acted without authority under the Constitution.

The facts are as follows:

1. *Of the origin of the late Cuban insurrection, and the direct concern of the United States in the conditions thereby brought about.*

The Cuban insurrection, which began with the uprising of the 24th of February, 1895, was simply a resumption of the revolution of 1868–1878, generally spoken of as the "Ten years' war," which, for a time, was supposed to have been terminated by the illusive peace of Zonjon.

For half a century the attempts of the Cubans to overthrow the sovereignty of Spain over the island, produced serious disturbances in the United States, grave and constant interference with its commerce, and frequent danger of the rupture of friendly relations with Spain. The conditions existing in the island were of vital concern to us. The Cubans were our neighbors, with whom our relations were necessarily intimate and extensive; and

> "they had been engaged in a struggle for independence, with stronger reasons than ex-

isted in our own case when we rebelled against the mother country."

Treaty and Protocols accompanying the message of the President, transmitting the treaty with Spain, Jan. 4, 1899 (55th Cong., 3rd Session, Senate Document No. 62, Part I.), Annex to Protocol No. 15, p. 209.

As early as 1875 President Grant called attention to the horrors of the situation and the consequent injuries to the interests of the United States and other nations, and also to the fact that the agency of others, either by mediation or by intervention, seemed to be the only alternative, which must sooner or later be invoked for the termination of the strife. During that administration, notwithstanding that it was clearly intimated to Spain that the United States could not much longer endure the condition of affairs in Cuba, no unfriendly action was taken, and for ten years it suffered all the inconvenience and deprivation, destruction of trade and injury to its citizens incident to the struggle, which was temporarily quelled by the Peace of Zanjon, only to break out again in 1895 and to be waged

" with every feature of horror and desolation and profitless strife which had characterized the former struggle."

Ibid, Annex to Protocol No. 10, pp. 106–107.

Years before the last outbreak the Cuban people began to organize and prepare for it. The Cuban Revolutionary Party was formed with José Marti as its head. One of its main objects was to promote the sympathy of other countries. The military organization of the movement was completed by the election of Maximo Gomez as commander in chief. His election was the result of the choice of the principal

Cuban officers who had fought in the ten years' war of 1868-1878.

War material and equipments were secured, and the first actual uprising took place, as we have said, on the 24th of February, 1895.* From the very beginning conflicts between the Spanish troops and the Cubans were of daily occurrence.

Statement of facts enclosed with Mr. T. Estrada Palma's letter to the Secretary of State, December 7, 1895, 54th Cong., 1st Sess., Senate Document No. 166; 54th Cong., 2d Sess., Senate Report No. 1160.

2. *The first Cuban Constitution, and the formation of a government under it.*

Early in April José Marti issued a call for the selection of representatives of the different army corps of the Cuban Army of Liberation to form a plan of civil government. His death at Boca de Dos Rois, on the 19th of May, postponed the selection of these men, but in the beginning of September the call was complied with. Delegates from each of the army corps representing the Provinces of Santiago, Puerto Principe, Santa Clara, and the western part of the Island, comprising the Provinces of Matanzas and Havana, were accordingly elected to the Constituent Assembly which was to establish a civil government, republican in form.

A complete list of the members of this Assembly, together with an account of its organization and proceedings, is appended to the statement submitted by Mr. Palma to the Secretary of State.

Ibid, Exhibit B.

* "The resumption of the revolution of 1868–1878 began when the Cubans on February 24, 1895, declared a separation from the Spanish monarchy, and fighting between the Spanish troops and the Cuban forces soon began. By March the Cuban 'Army of Liberation,' as it was called, was said to number 43,000."

The Constituent Assembly met at Jimaguayu, in the Province of Puerto Principe, on the 13th of September, 1895.

The delegates elected Salvador Cisneros Betancourt, president of the Assembly, Rafael Mandulay, vice-president, and four secretaries.

Ibid.

Sessions were held on the 13th, 14th, 15th and 16th of September, at which the Assembly discussed "the Constitution which is to rule the destinies of the Republic."

On the 16th of September the "Constitution of the Provisional Government of Cuba" was adopted and signed by all the representatives,* whereupon the President and other members of the Assembly

> "swore upon their honor to loyally and strictly observe the fundamental code of the Republic of Cuba."
>
> *Ibid.*

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* The Constitution was as follows:

CONSTITUTION OF THE PROVISIONAL GOVERNMENT OF CUBA.

The revolution for the independence and creation in Cuba of a democratic Republic in its new period of war, initiated on February 24th last,[1] solemnly declares the separation of Cuba from the Spanish monarchy, and its constitution as a free and independent State, with its own Government and supreme authority under the name of the Republic of Cuba, and confirms its existence among the political divisions of the world.

The elected representatives of the revolution, in convention assembled, acting in its name and by the delegation which for that purpose has been conferred upon them by the Cubans in arms, and previously declaring before the country the purity of their thoughts, their freedom from violence, anger, or prejudice, and inspired only by the desire of interpreting the popular voice in favor of Cuba, have now formed a compact between Cuba and the world, pledging their honor for the fulfillment of said compact in the following articles of the constitution:

ARTICLE I. The supreme powers of the Republic shall be vested in a government council composed of a president, vice-president, and four secretaries of state, for the dispatch of the business of war, of the interior, foreign affairs, and of the treasury.

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[1] The expression "in its new period of war," means that the Cubans regarded the revolution as a continuous movement from the time of the rising at Yara in 1868. The "first period" was terminated by the so-called "peace of Zanjon." The second started with the uprising at Baire, February 24, 1895. But the Cubans hold that the revolution had not ceased in the interval.

On the 18th of September, the Assembly again met and elected a government council, as follows:

President—SALVADOR CISNEROS BETANCOURT.
Vice-President—BARTOLOME MASO.
Secretary of War—CARLOS ROLOFF.
Secretary of the Treasury—SEVERO PINO.
Secretary of the Interior—Dr. SANTIAGO CONIZARES.
Secretary of Foreign Relations—RAFAEL M. PORTUONDO.
Subsecretary of War—MARIO MENOCAL.
Subsecretary of the Treasury—Dr. JOAQUIN CASTILLO.
Subsecretary of the Interior—CARLOS DUBOIS.
Subsecretary of Foreign Relations—Dr. FERMIN VALDES DOMINGUEZ.

These gentlemen having been installed in office and having entered upon the discharge of their duties, the election of the general-in-chief of the "Army of Liberation," lieutenant general and diplomatic agent followed, with the result that General Gomez and Major-General Antonio Maceo

ART. II. Every secretary shall have a sub-secretary of state, in order to supply any vacancies.

ART. III. The government council shall have the following powers:

1. To dictate all measures relative to the civil and political life of the revolution.

2. To impose and collect taxes, to contract public loans, to issue paper money, to invest the funds collected in the island, from whatever source, and also those which may be raised abroad by loan.

3. To arm vessels, to raise and maintain troops, to declare reprisals with respect to the enemy, and to ratify treaties.

4. To grant authority, when it is deemed convenient, to order the trial by the judicial power of the president or other members of the council, if he be accused.

5. To decide all matters, of whatsoever description, which may be brought before them by any citizen, except those judicial in character.

6. To approve the law of military organization and the ordinances of the army, which may be proposed by the general in chief.

7. To grant military commissions from that of colonel upward, previously hearing and considering the reports of the immediate superior officer and of the general in chief, and to designate the appointment of the latter and of the lieutenant-general in case of the vacancy of either.

8. To order the election of four representatives for each army corps

were respectively chosen to those two principal military offices, while Mr. Palma was selected diplomatic agent.

Ibid.

On the same day the Assembly conferred on Mr. Palma the title of "Delegate Plenipotentiary of the Republic of Cuba."

Ibid.

On the 18th of October, 1895, President Cisneros promulgated certain laws for the civil government of the Republic.

Chapter I. is entitled "Territorial Division" and consists of Articles I. to XI., inclusive.

By Article I. the Republic is declared to comprise:

> "The territory occupied by the Island of Cuba from Cape San Antonio to Point Maisi and the adjacent islands and keys."

By the remaining articles of this chapter the island is divided into four States, the boundaries of which are described, and these are again divided into

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whenever in conformity with this constitution it may be necessary to convene an assembly.

ART. IV. The government council shall intervene in the direction of military operations only when in their judgment it shall be absolutely necessary to do so to realize high political ends.

ART. V. As a requisite for the validity of the decrees of the council, at least two thirds of the members of the same must have taken part in the deliberations of the council, and the decrees must have been voted by the majority of those present.

ART. VI. The office of councilor is incompatible with any other of the Republic, and requires the age of twenty five years.

ART. VII. The executive power is vested in the president, and, in case of disability, in the vice president.

ART. VIII. The resolutions of the government council shall be sanctioned and promulgated by the president, who shall take all necessary steps for their execution within ten days.

ART. IX. The president may enter into treaties with the ratification of the government council.

ART. X. The president shall receive all diplomatic representatives and issue the respective commissions to the public functionaries.

ART. XI. The treaty of peace with Spain, which must necessarily have for its basis the absolute independence of the Island of Cuba, must be

districts, which are in time to be divided in prefectures and subprefectures, &c.

Chapter II. is entitled "of the government and its administration," which by Article XII. is vested in the Department of the Interior. Articles XIII. to XXV. prescribe the methods of its administration.

Ibid.

On the 25th of September a "Law of Civil Marriage" was promulgated.

On the 6th of October provision was made for the organization of a postal service.

On the 18th of October, a law was enacted for the organization of the public treasury.

See also "Instructions to the Officers of the Department of the Treasury of the Republic of Cuba," October 25, 1895, "Extract of the Sessions of the Government Council, Republic of Cuba," ratified by the Secretary, &c.

Ibid.

In September, 1895

> "as we know by official documents printed on the spot, the insurgent government was regularly organized, a constitution adopted,

ratified by the government council and by an assembly of representatives convened expressly for this purpose.

ART. XII. The vice-president shall substitute the president in the case of a vacancy.

ART. XIII. In case of the vacancy in the offices of both president and vice-president on account of resignation, deposition, or death of both, or from any other cause, an assembly of representatives for the election to the vacant offices shall be convened, the senior secretaries in the meanwhile occupying the positions.

ART. XIV. The secretaries shall have voice and vote in the deliberations of resolutions of whatever nature.

ART. XV. The secretaries shall have the right to appoint all the employees of their respective offices.

ART. XVI. The secretaries in cases of vacancy shall substitute the secretaries of state and shall then have voice and vote in the deliberations.

ART. XVII. All the armed forces of the Republic and the direction of the military operations shall be under the control of the general in chief,

a president elected, and in due course various branches of the administration set in motion."

Report from the Senate Committee on Foreign Relations, Dec. 21, 1896, accompanying Senate Joint Resolution No. 163, recognizing the independence of the Republic of Cuba; 54th Congress, 2d Sess., Senate Report No. 1160, p. 24.

It appears that this government continued to perform its functions undisturbed. The Senate Committee in the report referred to said:

"On the military side, as we officially know, they have organized, equipped and maintained in the field, sufficient forces to baffle the exertions of 200,000 Spanish soldiers. On the civil side they have organized their system of administration in every province, for, as we

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who shall have under his orders as second in command a lieutenant-general, who will substitute him in case of vacancy.

ART. XVIII. All public functionaries of whatever class shall aid one another in the execution of the resolutions of the government council.

ART. XIX. All Cubans are bound to serve the revolution with their persons and interests, each one according to his ability.

ART. XX. The plantations and property of whatever description belonging to foreigners are subject to the payment of taxes for the revolution while their respective governments do not recognize the rights of beligerency of Cuba.

ART. XXI. All debts and obligations contracted since the beginning of the present period of war until the promulgation of this constitution by the chiefs of the army corps, for the benefit of the revolution, shall be valid as well as those which henceforth the government council may contract.

ART. XXII. A government council may depose any of its members for cause justifiable in the judgment of two-thirds of the councilors, and shall report to the first assembly convening.

ART. XXIII. The judicial power shall act with entire independence of all the others. Its organization and regulation will be provided for by the government council.

XXXIV. The present constitution shall be in force in Cuba for two years from the date of its promulgation, unless the war for independence shall terminate before. After the expiration of the two years, an assembly of representatives shall be convened, which may modify it, and will proceed to the election of a new government council, and which will pass upon the last council.

Ibid, pp. 87 *et seq.*

know officially, they 'roam at will over at least two-thirds of the inland country.' Diplomatically they have maintained a regularly accredited representative in the United States for the past year, who has never ceased to ask recognition and to offer all possible information."

Ibid.

3. *Extent of the insurrection by the end of* 1895.

In his message to Congress of December 2, 1895, President Cleveland said:

"Cuba is again grossly disturbed. An insurrection, in some respects more active than the last preceding revolt, which continued from 1868 to 1878, now exists in a large part of the eastern interior of the island, menacing even some populations on the coast. Besides deranging the commercial exchanges of the island, of which your country takes the predominant share, this flagrant condition of hostilities, by arousing sentimental sympathy and inciting adventurous support among our people, has entailed earnest effort on the part of this Government to enforce obedience to our neutrality laws and to prevent the territory of the United States from being abused as a vantage ground from which to aid those in arms against Spanish sovereignty. * * * Though neither the warmth of our people's sympathy with the Cuban insurgents nor our loss and material damage consequent upon the futile endeavors thus far made to restore peace and order, nor any shock our humane sensibilities may have received from the cruelties which appear to especially characterize this sanguinary and fiercely conducted war, have in the least shaken the determination of the Government to honestly fulfill every international obligation, yet it is to be earnestly hoped on every ground that the devastation of armed conflict may speedily be stayed, and order and quiet restored to the distracted island, bringing in their train the activity and thrift of peaceful pursuits."

President Cleveland's third annual message.

4. *The Cuban cause is presented to the Secretary of State.*

Mr. Palma, who, as we have seen, had been duly accredited as the diplomatic delegate plenipotentary of the Republic of Cuba, under an appointment by the Constituent Assembly of Cuba, was received informally by the President for the purpose of presenting the case of Cuba to our Government.

On the 7th of December, 1895, he addressed a note to the Secretary of State, accompanied by a statement of facts, in which the case of Cuba was set forth officially. That document was printed by order of the Senate, and was appended to the Senate Report here before referred to.

> "Additional views of Mr. Morgan and Mr. Mills in support of the Report of the Committee," &c., 54th Congress, 2d Session, Senate Report, No. 1160, p. 27.

Mr. Palma's letter was accompanied by several papers which set forth fully the grievances complained of by the Cubans. In its nature it was

> "a declaration of the independence of Cuba, stating the grounds of their united action."
> *Ibid*, pp. 27-28.

These papers narrated the causes of the Cuban revolution, which Mr. Palma said had reached that stage where the issue was "independence or extermination." They reviewed the preliminary organization of the revolt; the uprising; the growth of the revolution; the battles and campaigns that had already been fought, including the victorious campaigns of General Gomez against Captain General Martinez Campos, which had resulted in the recall of the latter to Spain and the appointment of Captain-General Weyler in his place; the military or-

ganization of the Cubans; their civil government; and the general character of the war.

54th Congress, 1st Session, Senate Document No. 166, pp. 1–16; 54th Congress, 2d Session, Senate Report No. 1160, Appendix No. 3, pp. 57–73.

5. *The situation engages the attention of Congress.*

The civil war, like the prior attempts at Cuban independence, entailed upon us heavy burdens. It made it necessary to patrol our coasts, to tax both civil and military resources in order to detect and prevent expeditions from our shores in the interests of the insurgents, and to repress the natural sympathy of our citizens, while as a nation we remained passive witnesses of misery, bloodshed and starvation in a land almost within sight of our borders.

The legislative department, however, was not inactive.

In the early part of 1896, both Houses of Congress expressed the opinion by concurrent resolution that a condition of public war existed in Cuba requiring the recognition of a state of belligerency in that island.

This resolution, which was passed by the Senate on the 28th of February, 1896, proposed that —

> "the friendly offices of the United States should be offered by the President to the Spanish government for the recognition of the independence of Cuba."

The House of Representatives adopted a substitute declaring that

> "Congress, believing that the only permanent solution of the contest, equally in the interest of the people of Cuba and other nations, would be the establishment of a government by the choice of the people of Cuba, it is the sense of Congress that the Government of the United States should use its good offices and friendly influence to that end."

The substitute was accepted by the Senate and agreed to March 2, 1896.

6. *President Cleveland's unsuccessful efforts to bring about peace.*

In accordance with the suggestion of Congress, President Cleveland tendered to Spain the friendly offices of the Government. Then, as was done during the ten years' war (1868–1878), the United States Government testified its grave concern and offered its aid to put an end to bloodshed in Cuba. But any mediation on our part was not accepted.

President McKinley's First Annual Message, Dec. 6, 1897.

President Cleveland, in his Message to Congress of December, 1896, was, however, constrained to say:

> "When the inability of Spain to deal successfully with the insurrection has become manifest, and it is demonstrated that her sovereignty is extinct in Cuba for all purposes of its rightful existence, and when a hopeless struggle for its reestablishment has degenerated into a strife which means nothing more than the useless sacrifice of human life and the utter destruction of the very subject matter of the conflict, a situation will be presented in which our obligations to the sovereignty of Spain will be superseded by higher obligations, which we can hardly hesitate to recognize and discharge."

7. *Further agitation of the subject in Congress.*

On the 21st of December, 1896, the Senate Committee on Foreign Relations reported a joint resolution as follows:

> "*Resolved* * * *, That the independence of the Republic of Cuba be, and the same is hereby, acknowledged by the United States of America.
>
> *Be it further resolved*, That the United States will use its friendly offices with the

Government of Spain to bring to a close the war between Spain and the Republic of Cuba."

Report of Senator Cameron from the Committee on Foreign Relations, &c., Dec. 21, 1896; 54th Congress, 2d Session, Senate Report No. 1160, p. 25.

In its report the committee, after reviewing at length the condition of affairs in Cuba, and expressing its opinion that the insurgents had an established government of their own and possessed all the powers and incidents of sovereignty entitling them to take and maintain their place among the sovereign powers of the world, said:

"There is no reason to suppose that any portion of the Cuban people would be dissatisfied by our recognizing their representative in this country or that they disagree in the earnest wish for that recognition. The same thing could hardly be said of all the countries recognized by Monroe in 1822. Greece had no such stability when it was recognized by England, Russia and France. Belgium had nothing of the sort when she was recognized by all the powers in 1830. Of the states recognized by the treaty of Berlin in 1878, we need hardly say more than that they were the creatures of intervention."

Ibid, p. 24.

8. *The second Cuban constitution.*

Meanwhile and throughout the ensuing year the revolution in Cuba continued unabated. The Cuban army maintained its strength, and the revolutionary government still asserted itself in spite of the fearful odds arrayed against it.

On the 29th of October, 1897,

"the representatives of the Cuban people, freely meeting in constituent assembly (at La

> Yaya), convoked by virtue of the mandate contained in the constitution of the 16th of September, 1895,"

adopted a second constitution.

This "Constitution of the Republic of Cuba, and brief sketches of the President of the Republic and his Cabinet," was presented to the United States Senate on the 9th of February, 1892, by Senator Cannon, and was printed by order of the Senate.

> "Constitution of the Republic of Cuba," 55th Congress, 2d Session, Senate Document No. 129.

In the preamble the delegates to the convention ratified their "firm and unshakable resolve of obtaining the absolute and immediate independence of the island, in order to establish in it a democratic republic," and "inspiring" themselves "in the present necessities of the revolution," decreed the constitution which followed.

Title I. (Arts. 1–3, inclusive), treats "of the territory and of citizenship."

Article 1 declares that the "Republic of Cuba will embrace all the territory occupied by the Island of Cuba and the adjacent islands and keys."

Title II. (Arts. 4–14, inclusive), treats "of industrial and political rights."

Article 4 is as follows:

> "No one shall be arrested, indicted or suffer sentence, but on account of acts punished in laws previous to the execution of the acts and in the manner provided by the said laws."

Title III. treats "*of the Government of the Republic.*" This article is divided into five sections, entitled "of the public powers" (Arts. 15–17), "of the Government Council" (Arts. 18–26), "of the President and Vice-President of the Republic" (Arts. 27–29), "of the Secretaries of State" (Arts. 30–35),

and "of the Secretary of the Government Council" (Arts. 36 37), respectfully.*

Title 4 (Arts. 38–45, inclusive) is entitled "of the Assembly of Representatives."

By Article 38, it is provided that

> "the assembly of representatives shall assemble two years after this law is promulgated,† and shall have power to make a new constitution or to modify this one, to censure the acts of the Government, and to provide for all the securities of the Republic. The Government Council with due anticipation and under the strictest responsibility, shall adopt the opportune measures, so that this constitutional provision shall be complied with."

Article 40 provided:

> "If the Government, in conformity with excerpt 15 of * * * Article 22, shall make peace with Spain, the Government shall call the assembly that must ratify the treaty.

* This title is as follows:

TITLE III.—OF THE GOVERNMENT OF THE REPUBLIC.

SECTION 1. *Of the public powers.*

ARTICLE 15. The executive power is vested in a Government Council which will have the faculty of dictating laws and provisions of a general character, in accordance with this constitution.

ARTICLE 16. The administration of justice in reference to crimes belongs to the war jurisdiction and will be exercised in the manner determined by the laws.

ARTICLE 17. The administration of justice in reference to civil matters belongs to the civil authorities and its procedure shall be regulated by a law.

SECTION 2.—*Of the Government Council.*

ARTICLE 18. The Government Council is composed of a president, vice-president, and four secretaries of state, for the dispatch of the affairs of war, treasury, foreign, and interior. All the members of the council have voice and vote in its deliberations.

ARTICLE 19. To be president or vice-president, it is required to be a native Cuban, or a Cuban citizen with more than ten years of service to

† When the time arrived for the meeting of the Assembly of Representatives (in the fall of 1899) the island of Cuba was occupied by the American forces, and the President was governing the entire island by martial law.

> This assembly shall temporarily provide for the government and administration of the Republic until the definite constituent assembly shall meet."

Article 41 was as follows:

> "If Spain, without any previous agreement, with the Government Council, evacuates all the territory, an assembly shall be convoked which will have the same powers specified in the second paragraph of the previous article. It being understood that this case shall have arrived when the Cuban armies shall occupy permanently all the territory of the island, even if the enemy retain in its power some fortresses."

Title V. (Arts. 46–48) was entitled "General Provisions."

By Article 46 the Republic guarantees only the debts recognized by the Constitution of 1895 and

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the cause of the independence of Cuba, and to be of the age of 30 years; to be secretary of state, the age of 25 years.

ARTICLE 20. The Government Council shall appoint its secretary, whom it can freely remove.

ARTICLE 21. Each secretary of state shall have a subsecretary, who will substitute the secretary in cases of vacancy, absence, or illness, and who will discharge any commissions intrusted to him by the Government Council.

ARTICLE 22. Besides the powers conferred upon it by other articles of this constitution, the Government Council has the following:

1. To make all laws and regulations regarding the revolution and the military, civil, and political life of the Cuban people.

2. To resolve the petitions addressed to it, ordering those which are not properly transmitted to take their due course.

3. To depose, for just cause and under its responsibility, any councilor or subsecretary. This resolution shall be reported to the first assembly and can only be passed by the affirmative votes of four councilors.

4. To appoint secretary and subsecretary for the transacting of business in any department, when both positions shall have been vacant for two months.

5. To appoint and remove public functionaries of all classes in the manner provided by law, ordering that they shall be submitted to the courts of justice in the proper cases.

6. To determine the policy of the war and the general lines of the campaign, and to intervene, when, in their judgment, there be founded

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those which may afterwards have been or are legitimately contracted.

By Article 47 foreigners were precluded from claiming indemnity for damage caused by the Cuban forces

> "previously to the date on which their respective Governments recognize the belligerancy or independence of Cuba."

Article 48 provided that the Constitution should

> "be in force until another one shall revoke it."

An "Additional and temporary article of the constitution" provides: First, For revision of the penal laws; Second, For a modification of the laws of procedure, so that (1) it shall be more simple and

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motive for it, in the military operations, always by means of the generals of the nation.

7. To raise troops, to declare reprisals, and to grant letters of marque.

8. To grant military ranks from sub-lieutenant to major-general, in the form established by the law of military organizations.

9. To issue paper money, to coin money, fixing its kind and value.

10. To contract loans, determining when they shall become due, the interests, discounts, commissions, and guarantees, and to make all negotiations advised by the public weal, being strictly responsible for the use it shall make of these faculties and of those provided in the previous article.

11. To levy taxes, to decree the investment of the public funds, and to ask and approve the accounts of the same.

12. To determine the foreign policy and to appoint and remove agents, representatives and delegates of all classes.

13. To grant passports.

14. To issue the safe conducts necessary for the discharge of the functions of the Government.

15. To make treaties with other powers, choosing the commissioners who are to celebrate them; but without being able to delegate in them its final approval. The one of peace with Spain must be ratified by the Assembly, and cannot be initiated but on the basis of the absolute and immediate independence of all the Island of Cuba.

ARTICLE 23. The powers which this law grants to the Government Council or to any of its members can not be delegated.

ARTICLE 24. All the resolutions of the council must be passed by absolute majority. At least four councilors must be in attendance, among them the secretary of the department to which the resolution belongs.

ARTICLE 25. The councilors can not exercise or be appointed to any

applicable, (2) to assure the independence of the courts, (3) to provide for appeals to higher courts, and (4) to make judicial responsibility effective; Third, For a law of military organization, and other matters relating to the regulations affecting the Cuban forces.

On the same day (October 29, 1897) a new Government Council was constituted as follows:

President.—Maj.-Gen. Bartolome Maso.
Vice-President.—Brig. Domingo Mendez.
Secretary of War.—Brig. Jose B. Aleman.
Secretary of the Treasury.—Col. Ernesto Fonts Stirling.
Secretary of the Interior.—Dr. Manuel R. Silva.
Secretary of Foreign Relations.—Col Andres Moreno de la Torre.

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other office while they discharge their functions, excepting that of representative in the assembly, which shall ratify the treaty of peace with Spain.

Article 26. The councilors shall not be indicted without being previously authorized by the Government, nor arrested except in case of *flagrante delicto*. The subsecretaries, when carrying out an express and definite commission of the Government, shall enjoy the same prerogative.

Section 3.—*Of the President and Vice-President of the Republic.*

Article 27. The President of the Republic is the president of the Government Council, and in his representative character he is the superior in rank to all the functionaries.

Article 28. His powers are:

1. To represent the Republic in its official acts and relations.

2. To authorize with his signature the documents addressed to foreign functionaries of equal rank.

3. To sign the proclamations and manifestoes agreed upon by the Government Council.

4. To countersign the dispatches and certificates issued by the secretaries of state and by that of the council.

5. To authorize in the name of the Government Council the diplomas and appointments made by it.

Article 29. The Vice-President will take part with voice and vote in all the sessions of the council and will substitute the President with all his faculties, in case of vacancy, absence, or illness.

Section 4.—*Of the secretaries of state.*

Article 30. The secretaries of state shall have as exclusive faculties the transaction of all business of their departments, and will be the

Sub-Secretary of War.—COL. RAFAEL DE CÁRDENAS.
Sub-Secretary of the Treasury.—LIEUT. COL. SATURNIUS LASTRA.
Sub-Secretary of the Interior.—MAJ. PEDRO AGUILERS KINDELAN.
Sub-Secretary of Foreign Relations.—COL. NICOLAS ALBERDI.
Ibid., pp. 6, 7.

The Government Council thereupon re appointed General Gomez as General-in-Chief of the army, and appointed Major-Gen. Calixto Garcia as Lieutenant-General in place of Gen. Maceo, who had fallen in battle.

Ibid., p. 7.

9. *The United States continues its efforts to put an end to the war.*

Just prior to this time our Minister in Spain had been directed by the President to impress upon the Spanish Government

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superior heads of all the functionaries and employees of their departments, who will be proposed by them, according to the law, when the Government Council is to appoint them.

ARTICLE 31. The secretary of war will be the superior chief in rank of the army of liberty.

ARTICLE 32. The administrative service of the army depends on the secretary of war, as shall be regulated by the law of military organization.

ARTICLE 33. The secretary of the treasury will be the custodian of the national funds, and matters in relation to the public debt and accounts shall be under his care.

ARTICLE 34. The secretary of foreign affairs is the superior and immediate chief of all the agents, representatives, and delegates abroad.

ARTICLE 35. The secretary of the interior shall have charge of matters of civil character and is the superior chief of the authorities and employees of his department.

SECTION 5.—*Of the secretary of the Government Council.*

ARTICLE 36. The secretary of the council will be present, without voice or vote, at all the sessions of the Government Council; he will draw its minutes, authorizing them with his signature, after having been approved and signed by all the councilors who have been present at the meeting.

ARTICLE 37. He will issue, in conformity with the archives, the certificates which may be ordered by the President or by the Government Council.

> "the sincere wish of the United States to lend its aid toward the ending of the war by reaching a peaceful and lasting result, just and honorable alike to Spain and to the Cuban people. * * * All that was asked or expected was that some safe way ought be speedily provided and permanent peace restored."
>
> President McKinley's First Annual Message, Dec. 6, 1897.

The reply of the Spanish Government was received on the 23d day of October. It was in the direction of a better understanding. It admitted our deep concern in the war in Cuba, and the justice of our desires. It declared that the present Spanish Government was bound by every consideration to a change of policy that should satisfy the United States and pacify Cuba within a reasonable time. In this connection President McKinley said:

> "Decrees in application of the foreshadowed reforms have already been promulgated. * * * It is honestly due to Spain and to our friendly relations with Spain that she should be given a reasonable chance to realize her expectations and to prove the asserted efficacy of the new order of things to which she stands irrevocably committed. * * * The near future will demonstrate whether the indispensable condition of a peace, just alike to the Cubans and to Spain, as well as equitable to all our interests so intimately involved in the welfare of Cuba, is likely to be attained. If not, the exigency of further and other action by the United States will remain to be taken. When that time comes, that action will be determined in the light of the obligation this Government owes to herself, to the people who have confided to it the protection of their interests and honor, and to humanity. * * * If it shall hereafter appear to be a duty imposed by our obligations to ourselves, to civilization and to humanity to intervene with force, it shall be

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without fault on our part and only because the necessity for such action will be so clear as to command the support and approval of the civilized world."

10. *The destruction of the Maine*, and the *events which followed.*

On the 25th of January, 1898, the Spanish Government having been advised of the purpose of this Government to resume friendly naval visits at Cuban ports, which had been interrupted during this period, the United States battleship *Maine* entered the port of Havana, where she remained until the 15th of February, when she was destroyed by the explosion of a submarine mine. In the catastrophe two officers and two hundred and sixty-four of her crew perished.

This calamity created intense excitement and indignation throughout the United States, the popular belief being that the Spanish authorities were directly or indirectly responsible for it.

President McKinley's message of March 28, 1898.

On the 8th of March, 1898, Congress passed an act appropriating $50,000,000 for the national defense, and giving the President discretionary power in its use.

30 Stat., 274.

On the 27th of March, 1898, the President submitted through Minister Woodford propositions to the Spanish Government looking to an armistice until October 1st for the negotiation of peace with the good offices of the President. The reply of the Spanish cabinet offered as the means to bring about peace in Cuba, to confide the preparation thereof to the insular parliament, inasmuch as the concurrence of that body would be necessary to reach a final result.

Meanwhile, on the 28th of March, the President submitted to Congress the conclusions of the Court of Inquiry organized to inquire into the cause of the destruction of the *Maine*.

These conclusions were:

> "That the loss of the *Maine* was not in any regard due to fault or negligence on the part of any of the officers or members of her crew.
>
> That the ship was destroyed by the explosion of a submarine mine, which caused the partial explosion of two or more of her forward magazines; and
>
> That no evidence has been obtainable fixing the responsibility for the destruction of the *Maine* upon any person or persons.
>
> President McKinley's message of March 28, 1898.

11. *Recognition of Cuban independence.*

The following day a resolution was introduced in the Senate recognizing the independence of Cuba.

Various other resolutions contemplating the intervention of the United States in the Cuban war, were introduced in both Houses of Congress between that time and April 11th. Among them were the following:

> JOINT RESOLUTION No. 2, authorizing and requesting the President to issue a proclamation recognizing the political independence of the Republic of Cuba.
>
> SENATE RESOLUTION No. 40, instructing the Committee on Foreign Relations to inquire what obligations the United States have assumed toward the people of Cuba by asserting and maintaining the right to prevent the acquisition of that island by any European power and compelling its people to remain subject to the dominion of Spain.
>
> SENATE RESOLUTION No. 185, that it is the sense of the Senate that Congress should, with all due and convenient speed, acknowl-

edge by appropriate act the political independence of the Republic of Cuba.

JOINT RESOLUTION No. 132, recognizing the independence of the Republic of Cuba, and for other purposes.

JOINT RESOLUTION No. 133, recognizing the independence of the Republic of Cuba and declaring war against the Kingdom of Spain.

JOINT RESOLUTION No. 134, recognizing the independence of the Republic of Cuba, and providing for intervention by the United States.

JOINT RESOLUTION No. 135, directing and empowering the President, in his discretion, to terminate, by intervention, the hostilities between Spain and the people of Cuba, and in favor of the independence of said people.

JOINT RESOLUTION No. 142, for the recognition of the independence of the Republic of Cuba.

JOINT RESOLUTION No. 145, authorizing the President to take such steps as are necessary to put an end to hostilities in Cuba, and to establish a republican form of government on that Island.

On the 11th of April the President addressed a message to Congress in which he asked for authority—

> "to take measures to secure a full and final termination of hostilities between the Government of Spain and the people of Cuba, and to secure in the island the establishment of a stable government, capable of maintaining order and observing its international obligations, insuring peace and tranquility and the security of its citizens as well as our own, and to use the military and naval forces of the United States as may be necessary for those purposes."

The resolutions above enumerated and the President's messages of March 28 and April 11, 1898, were referred to the Senate Committee on Foreign Relations on the 13th of April. That committee submitted a report in which it recommended the adoption of a joint resolution in the exact language

of the resolution as passed (see *post*, pp. 32-33), except that the first paragraph was as follows:

> "That the people of the Island of Cuba are, and of right ought to be, free and independent, and that the Government of the United States hereby recognizes the Republic of Cuba as the true and lawful government of the Island."
>
> 55th Cong., 2nd Sess., Senate Report No. 885.

In its report the Committee said:

> "Upon due consideration of all of the relevant facts of the relations of this Government with Spain, including the destruction of the *Maine*, and of the history of the rebellion, it is the opinion of your committee that the United States ought at once to recognize the independence of the people of Cuba, and also ought to intervene to the end that the war and its unexampled atrocities shall cease, and that such independence shall become a settled political fact at the earliest possible moment, by the establishment by the free action of the people of Cuba when such action can be had, of a government independent in fact and form.
>
> It is believed that recognition of the belligerency of the insurgents in Cuba, if it had been given seasonably, when it was suggested by concurrent resolutions to that effect passed by Congress, would have insured the speedy termination of the war without involving the United States in the contest. Such recognition was not given, and conditions have changed so materially since it was thus passed that, if given now, it would fall far short of supplying the just requirements of the present situation in the light solely of the interests of the United States.
>
> The recognition of the independence of the people of Cuba is justified and demanded by the highest considerations of duty, right and policy.
>
> The insurgents hold the eastern portion of the island, to the practical exclusion of Spain.

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This possession extends over one body of territory comprising fully one half of the area of Cuba.

The extermination by Spain of the peaceful inhabitants of the western portion of the island has so affected the balance of population between these moieties of Cuba that the insurgents comprise in the eastern half nearly one-third of the population of the island. That third of the population pays taxes to them, serves in their armies and in every way supports and is loyal to them. This situation has existed ever since the first few months of the war. The armies of Spain under Campos, Weyler and Blanco, successively, have been repelled in every invasion that they have attempted of the eastern half of the island.

The cause of Spain has continually grown weaker and that of the insurgents has grown stronger. The former is making no substantial effort for the recovery of these lost provinces. Their people are secure from invasion and cruel administration. Spain has never been able to subject them to her unprecedented and murderous policy of concentration and extermination. Her armies have been more than decimated in the attempt to subdue them. Two hundred thousand of her soldiers have failed to reduce the insurgents. The few reinforcements that she is now sending to Cuba do not supply a tithe of her losses caused by battle and disease.

Her control over the western portion of the island is dominance over a desolation which she herself has created. Even there she controls only the territory occupied by her cantonments and camps. Outside these the insurgents are everywhere in presence.

In the population of Cuba the native born preponderate in a very large proportion, probably of eight to one. We have been assured by the most unimpeachable authority (we mean Senators Proctor, Gallinger, Thurston and Money), that the native born Cubans everywhere, even within the military lines of Spain, are opposed to the parent State, and are in sympathy with the insurgents.

> We have also been assured by the same authority that the native Cubans, by superiority in education, are better qualified than the Spaniards, and are thoroughly capable to administer the government of the island.
>
> The preceding observations have assumed a certain control and sovereignty by Spain over the western portion of Cuba. We have indicated its character. It is limited to scattered and fortified areas, and it is not a civil sovereignty. It is merely a military occupation of fortified places."
>
> *Ibid.*, pp. VII.-IX.

The House of Representatives had on the same day (April 13th) passed a resolution authorizing and directing the President to intervene at once to stop the war in Cuba, with the purpose of securing peace and order there, and establishing, by the free action of the people thereof, a stable and independent government of their own, and empowering him to use the land and naval forces to execute that purpose.

On the 18th of April the Senate amended the House resolution, by substituting in its place the one that day reported by the Senate Committee on Foreign relations.

On the 19th of April, after prolonged conferences the Senate and the House of Representatives adopted the joint resolution as amended by the Senate, omitting from the first section the words "and that the Government of the United States hereby recognizes the Republic of Cuba as the true and lawful government of that island."

The resolution as adopted, and as approved by the President the following day (April 20, 1898), read as follows:

> "JOINT RESOLUTION for the recognition of the independence of the people of Cuba, demanding that the Government of Spain relinquish its authority and government in the Island of Cuba, and to withdraw its land and naval forces from Cuba and Cuban waters, and di-

recting the President of the United States to use the land and naval forces of the United States to carry these resolutions into effect.

Resolved, By THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED:

First.—That the people of the Island of Cuba are, and of right ought to be, free and independent.

Second.—That it is the duty of the United States to demand, and the Government of the United States does hereby demand, that the Government of Spain at once relinquish its authority and government of the Island of Cuba and withdraw its land and naval forces from Cuba and Cuban waters.

Third.—That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States, and to call into actual service of the United States the militia of the several States, to such extent as may be necessary to carry these resolutions into effect.

Fourth.—That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction, or control over said island except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the island to its people."

12. *Diplomatic relations between the United States and Spain severed.*

The President having communicated to the Spanish Minister in Washington the demand which it became his duty to address to the Spanish Government in obedience to the joint resolution, the Minister asked for his passports and withdrew. The United States Minister at Madrid was in turn notified by the Spanish Minister for Foreign Affairs that the withdrawal of the Spanish representative from the United States had terminated diplomatic relations between the two countries, and that all official

communications between their respective representatives ceased therewith.

President McKinley's message of April 25, 1898.

It appeared from the note addressed to the United States Minister at Madrid by the Spanish Minister for Foreign Affairs on the 21st of April, 1898, that the Spanish Government regarded the demands of the United States Government as measures of hostility. Hence followed the immediate and complete severance of diplomatic relations—

> " which by the usage of nations accompanies an existent state of war between sovereign powers."
>
> *Ibid.*

13. *The United States becomes a party to the war.*

On the 22d of April, 1898, the President proclaimed a blockade of certain ports of the north coast of Cuba, then occupied by the Spanish forces.

30 Stat., 1769.

On the same day Congress passed the Act (Chap. 187) entitled "An Act to provide for temporarily increasing the military establishment of the United States in time of war, and for other purposes."

30 Stat., 361.

On the 23d of April the President, under the authority of this Act, issued a proclamation calling forth volunteers in order to carry the joint resolution into effect.

30 Stat., 1770.

On the same day a decree was issued by the Spanish Government declaring that—

> "The state of war existing between Spain and the United States terminates the treaty of peace and friendship of the 27th October, 1795;

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the protocol of the 12th of January, 1877, and all other agreements, compacts and conventions that have been in force up to the present between the two countries."

Proclamation and decrees during the war with Spain, Washington, Government Printing Office, 1899.

On the 25th of April Congress passed the act (Chap. 189), entitled:

"AN ACT DECLARING THAT WAR EXISTS BETWEEN THE UNITED STATES OF AMERICA AND THE UNITED KINGDOM OF SPAIN."

This act was as follows:

"First, That war be, and the same is, hereby declared to exist, and that war has existed since the 21st day of April, 1898, including said day, between the United States of America and the Kingdom of Spain.

Second, That the President of the United States be, and he hereby is, directed and empowered to use the entire land and naval forces of the United States; and to call into the actual service of the United States, the militia of the several States, to such extent as may be necessary to carry this act into effect."

30 Stat., 364.

On the 26th of April Congress passed an act for the reorganization of the line of the army.

Ibid.

On the 25th of May the President called for additional volunteers.

30 Stat., 1772.

14. *Of the principal events of the war, and the cessation of hostilities.*

It is matter of public history that at the beginning of the war many of the Cuban ports were in the possession and control of the Spanish military forces.

The United States sent its fleets and armies to the Island, joined forces with the Cubans, waged battle against the common enemy and continued the struggle with such success, that before the end of July the Spanish Government made overtures of peace, resulting in the protocol of August 12th.

The first encounter of the war occurred on the 27th of April, when a detachment of the blockading squadron shelled the harbor forts and works in construction at Mantanzas.

On the 1st of May the Pacific fleet entered Manila Bay and destroyed a formidable Spanish fleet, consisting of ten war ships and a transport, besides capturing the naval station and forts at Cavite.

A number of minor naval demonstrations followed on the coasts of Cuba and Porto Rico.

On the 10th of June several hundred marines were landed at Guantanamo Bay. By June 20th additional forces were landed. On June 22d the advance of the army under Major General Shafter landed at Darquiri, about fifteen miles east of Santiago. The following day a movement against Santiago was begun. On the 24th an engagement took place, but by nightfall the army was within five miles of Santiago. On July 1st the United States forces gained the outworks of Santiago, and on the 2d El Caney and San Juan were taken, and the investment of the city was completed.

The navy co operated by shelling the town and the coast forts. On the 3d the Spanish fleet, attempting to leave the harbor, was met by the American squadron and completely destroyed.

The capitulation of Santiago followed. After a truce to allow of the removal of non-combatants, negotations continued from July 3d to July 15th, when the preliminaries of surrender were agreed upon. The capitulation embraced the entire eastern end of Cuba.

President McKinley's Second Annual Messages, Dec. 5, 1898.

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35. *Concert of action between the American and Cuban forces.*

"A short time before the commencement of the war there left Washington, from the Bureau of Military Information, two officers, Lieut. A. S. Rowan and Lieut. H. H. Whitney, to attempt the most difficult and dangerous enterprise of ascertaining existing conditions in the Islands of Cuba and Porto Rico, respectively. These efforts were eminently successful. * * * Lieutenant Rowan left the United States on April 9th and landed April 24th at El Portillo, about 70 miles west of Santiago de Cuba. He went into the interior, met General Garcia of the Cuban army, and remained with him for a short time, then together with Brig.-Gen. Enrique Callazo and Lieut.-Col. Carlos Hernandez, of General Garcia's staff, passed up to Manati on the north coast, and on May 4th went in an open boat to Nassau, New Providence, returning to the United States, May 13, 1898."

Report of the Major-General Commanding the Army, Nov. 5, 1898. Report of the Secretary of War, 1898, pp. 24-25.

"As soon as hostilities were commenced expeditions were immediately organized to give aid and support to the Cubans in the way of supplying them with arms, ammunitions of war and supplies, whenever and wherever possible. The first expedition with arms and supplies for the Cubans was started from Key West under the direction of Col. R. H. Hall, Fourth Infantry. * * * Also, a strong expedition was organized, consisting of 5,000 men, under the command of the senior officer then at Tampa, Maj. Gen. W. R. Shafter, the objective point being Tunas, on the south side of Cuba, where it was expected to open communication with the forces under General Gomez and support and co-operate with him in that mountain region (which is a healthful part of Cuba), and also to furnish all the supplies needed by that force. This expedition,

when fully prepared, was delayed on account of the movement of Admiral Cervera's fleet from Cape Verde Islands to the waters of the West Indies, and the movement of our troops was suspended awaiting the result of the expected conflict between that fleet and our own.

An important expedition, under Lieut. Col. Dorst, U. S. V., sailed from Key West to the north of Nassau, New Providence; thence directly south, landing at the harbor of Banes, on the north coast of Cuba, which has been held during the war by the Cubans, where he remained five days, landing a steamer load of the munitions of war most needed, including 7,500 rifles, 1,000,000 cartridges, 5,000 uniforms, and other material needed by the 10,000 Cubans under General Garcia."

Ibid.

On the 24th of June, Major-General Miles submitted a plan of campaign wherein, after outlining a series of military movements, he said:

"This army corps would also have the assistance of all the available forces of Garcia and Gomez, and would by that time be occupying practically two-thirds of the Island of Cuba."

Ibid., pp. 27-28.

"During this time Lieutenant Rowan had returned from his journey to Cuba, bringing with him to Washington Brigadier-General Collazo and Lieutenant-Colonel Hernandez, of General Garcia's staff. He also brought very important information concerning the active operations of the Cubans against the Spanish troops, and the location and strength of the Spanish forces in the eastern part of Cuba, numbering at that time some 31,000 men. The two Cuban officers mentioned accompanied me to Tampa, and Colonel Hernandez, having received permission from the Navy Department to be conveyed by a United States vessel to the harbor of Banes, carried the following letter from me to General Garcia:

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'Headquarters of the Army,
In the Field, Tampa, Fla., June 2, 1898.

Dear General: I am very glad to have received your officers, General Enrique Collazo and Lieut. Col. Carlos Hernandez, the latter of whom returns to-night with our best wishes for your success.

It would be a very great assistance if you could have as large a force as possible in the vicinity of the harbor of Santiago de Cuba, and communicate any information, by signals, which Colonel Hernandez will explain to you, either to our navy or to our army on its arrival, which we hope will be before many days.

It would also assist us very much if you could drive in and harass any Spanish troops near or in Santiago de Cuba, threatening or attacking them at all points, and preventing, by every means, any possible reinforcement coming to that garrison. While this is being done, and before the arrival of our army, if you can seize and hold any commanding position to the east or west of Santiago de Cuba, or both, that would be advantageous for the use of our artillery, it will be exceedingly gratifying to us.

With great respect and best wishes, I remain, very respectfully,

Nelson A. Miles,
Major-General, Commanding United States Army.
Lieutenant-General Garcia, Cuban Army.'

"This letter was sent in anticipation of the movement of the command under General Shafter, which sailed twelve days later. Colonel Hernandez left Key West with it June 2; General Garcia received it June 6, and I received his reply by cable June 9, of which the following is a copy:

'Mole St. Nicholas (via Washington), June 9, 1898.

General Miles,
Commanding United States Army.

Garcia's reply on June 6 to your letter of June 2.

'Will take measures at once to carry out your recommendation, but concentration of force will require some time. Roads bad and Cubans scattered. Will march without delay. Santiago de Cuba well fortified with advanced intrenchments, but believe good artillery position can be taken. Spanish force approximate 12,000 between Santiago de Cuba and Guantanamo, 3,000 militia. Will maintain a Cuban force near Holguin to prevent sending re-enforcements to Santiago.'

The above given to me by Admiral Sampson to forward to you.

Allen.'

"Also the following is an extract from a cablegram from Admiral Sampson to the Secretary of the Navy, which was repeated to me at Tampa, June 12th, for my information:

'Mole St. Nicholas, Haiti.

'General Miles' letter received through Colonel Hernandez on June 6th. Garcia regards his wishes and suggestions as orders, and immediately will take measures to concentrate forces at the points indicated, but he is unable to do so as early as desired on

account of his expedition to Banes Port, Cuba, but he will march without delay. All of his subordinates are ordered to assist to disembark the United States troops and to place themselves under orders. Santiago de Cuba well fortified with advanced intrenchments, but he believes position for artillery can be taken as Miles desires. Approximate, twelve thousand (12,000) regulars and three thousand (3,000) militia between Santiago and Guantanamo. He has sent force in order to prevent aid going to Santiago from Holguin. Repeats every assurance of good-will, and desires to second plans.

'SAMPSON.'

"It will be observed that General Garcia regarded my requests as his orders, and promptly took steps to execute the plan of operations. He sent 3,000 men to check any movement of the 12,000 Spaniards stationed at Holguin. A portion of this latter force started to the relief of the garrison at Santiago, but was successfully checked and turned back by the Cuban forces under General Feria. General Garcia also sent 2,000 men under Perez to oppose the 6,000 Spaniards at Guantanamo, and they were successful in their object. He also sent 1,000 men under General Rios against the 6,000 at Manzanillo. Of this garrison, 3,500 started to reenforce the garrison at Santiago, and were engaged in no less than thirty combats with the Cubans on their way before reaching Santiago, and would have been stopped had General Garcia's request of June 27 been granted. With an additional force of 5,000 men General Garcia besieged the garrison of Santiago, taking up a strong position on the west side and in close proximity to the harbor, and he afterwards received General Shafter and Admiral Sampson at his camp near that place. He had troops in the rear, as well as on both sides of the garrison at Santiago before the arrival of our troops."

Ibid., pp. 29-30.

"General Toral stated that he would surrender all the troops in the department of Santoago de Cuba, many of them from 70 to 100 miles distant and against whom not a shot had been fired; yet the activity of the Cuban troops and their dispositions had been such as to render the Spanish positions exceedingly perilous."

Ibid., p. 35.

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The following extracts are quoted from the report of Maj.-Gen. Shafter:

"On the morning of June 20 we arrived off Guantanamo Bay, and about noon reached the vicinity of Santiago, where Admiral Sampson came on board my headquarter transport. It was arranged between us to visit in the afternoon the Cuban general, Garcia, at Asserraderos, about 18 miles to the west of the Morro. During the interview General Garcia offered the services of his troops, comprising about 4,000 men, in the vicinity of Aserraderos, and about 500 under General Castillo at the little town of Cujababo, a few miles east of Daiquiri. I accepted his offer, impressing it upon him that I could exercise no military control over him except such as he would concede, and as long as he served under me I would furnish him rations and ammunition.

Ever since the receipt of my order I had made a study of the terrain surrounding Santiago, gathering information mainly from former residents of the city, several of whom were on the transports with me. At this interview all the possible points of attack were for the last time carefully weighed, and then, for the information and guidance of Admiral Sampson and General Garcia, I outlined the plan of campaign, which was as follows:

With the assistance of the small boats of the navy, the disembarkation was to commence on the morning of the 22d at Daiquri. On the 21st 500 insurgent troops were to be transferred from Aserraderos to Cujababo, increasing the force already there to 1,000 men. This force under General Castillo was to attack the Spanish force at Daiquiri in the rear at the time of disembarkation. This movement was successfully made. To mislead the enemy as to the real point of our intended landing, I requested General Garcia to send a small force (about 500 men), under General Rabi, to attack the little town of Cabanas, situated on the coast a few miles to the west of the entrance to Santiago Harbor, and where it was reported the enemy had several hundred men intrenched, and from which a

trail leads around the west side of the bay to Santiago.

I also requested Admiral Sampson to send several of his war ships, with a number of my transports, opposite this town for the purpose of making a show of disembarking there. In addition I asked the admiral to cause a bombardment to be made at Cabanas, and also at the forts around the Morro, and at the towns of Aguadores, Siboney and Daiquiri. The troops under General Garcia remaining at Aserraderos were to be transferred to Daiquiri, or Siboney on the 24th. This was successfully accomplished at Siboney."

Report of Secretary of War, 1898, p. 61.

"Early on this date (June 23d) General Lawton's advance reached Siboney, the Spanish garrison of about 600 men retiring as he came up, and offering no opposition except a few scattering shots at long range. Some of the Cuban troops pursued the retreating Spaniards and skirmished with them."

Ibid., p. 62.

"After the engagement at La Guasima, and before the end of the month, the army, including General Garcia's command, which had been brought on transports to Siboney from Asseraderos, was mostly concentrated at Sevilla, with the exception of the necessary detachments at Daiquiri and Siboney."

Ibid., p. 63.

"A few Cubans assisted in the attack at El Caney, and fought valiantly, but their numbers were too small to materially change the strength, as indicated above. * * * Up to this time I had been unable to complete the investment of the town with my own men, but to prevent any more reinforcements coming in, or the enemy escaping, I extended my lines as rapidly as possible to the extreme right, and completed the investment of the place, leaving General Garcia's forces in the rear of my right flank to scout the country for any approaching Spanish reinforcements, a duty which his forces were very competent to perform."

Ibid., pp. 68–69.

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The following are from messages and reports included in the Report of the Secretary of the Navy:

"Have received reliable information from Cuban officer the Spanish forces in the vicinity of Santiago consist of 7,000 men; * * * with superior force and insurgent force, which are ready, though mostly needing arms, Santiago de Cuba must fall," &c.

Rear Admiral Sampson to the Secretary of the Navy, June 8, 1898. Message and Documents, 1898-1899, Vol. IV. (abridgement), p. 667.

"The landing of the army was completed yesterday afternoon, all having disembarked, with the addition of 2,978 Cubans of General Garcia's forces, who were brought from Acerraderos to Siboney," &c.

Ibid, p. 683

"I respectfully report that the U. S. S. *Peoria*, under my command, left Key West June 25, convoying a landing expedition on the steamships *Florida* and *Fanita*. The forces on board these steamships consisted of about 300 Cubans under General Nuñez, 50 troopers of the Tenth United States Cavalry, under Lieutenant Johnson, and 15 volunteers under Mr. Winthrop Chanler. * * * On June 29 a landing was attempted. * * * but the enemy developed in such force that General Nuñez decided to abandon the attempt at this point. * * * A blockhouse was observed at the mouth of the Tayabacao River, * * * and this ship steamed within range and threw shell into this blockhouse and its vicinity; but eliciting no response or any sign of life, two boat loads of scouts, one of 15 Cubans under Captain Nuñez, and the other, of 15 volunteers, under Mr. Chanler, were landed, this ship occupying a position to protect the landing. As the boats reached the shore * * * a very destructive fire was opened upon them by a considerable force of Spaniards, who had remained concealed in earthworks about the blockhouse. Captain Nuñez was killed as he reached the shore, and several others were wounded.

* * * * * *

> The next day General Maximo Gomez appeared at Palto Alto, and a conference was held, at which General Gomez submitted in writing a plan of campaign, which is hereby respectfully forwarded. General Gomez expressed his ability to hold the position at Palo Alto for at least thirty days from July 4. He stated that he had at that time about 2,000 men under arms and could have a larger force were he able to arm and feed them."
>
> Lieutenant T. W. Ryan, commanding U. S. S. *Peoria* to Commodore Remey, July 14, 1898. *Ibid.*, pp. 690-691.

No better proof of the perfect sympathy and harmony of purpose between the troops of the United States and the Cuban army can be had than the following:

> "While enduring the hardships and privations of such a campaign, the troops generously shared their scanty food with the 5,000 Cuban patriots in arms, and the suffering people who had fled from the besieged city (Santiago)."
>
> General Field Order No. 1, Sibony, Cuba, July 16, 1898. Report of Secretary of War, 1898, No. 39.

16. *The United States enters upon the "military occupation" of Santiago and the eastern part of the Province of Santiago.*

Although the conditions of the surrender of Santiago were not finally agreed upon until July 15th (*ante*, p. 36), nevertheless, two days before that time, namely, on the 13th of July, 1898, the President issued the following executive order:

> "EXECUTIVE MANSION,
> Washington,
> JULY 13, 1898.
>
> THE SECRETARY OF WAR:
>
> Sir: The capitulation of the Spanish forces in Santiago de Cuba and in the eastern part of the Province of Santiago, and the occupa-

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tion of the territory by the forces of the United States, render it necessary to instruct the military commander of the United States as to the conduct which he is to observe during the military occupation.

The first effect of the military occupation of the enemy's territory is the severance of the former political relations of the inhabitants and the establishment of *a new political power*. Under this changed condition of things the inhabitants, so long as they perform their duties, are entitled to security in their persons and property and in all their private rights and relations. It is my desire that the inhabitants of Cuba should be acquainted with the purpose of the United States to discharge to the fullest extent its obligations in this regard. It will therefore be the duty of the commander of the army of occupation to announce and proclaim in the most public manner that we come not to make war upon the inhabitants of Cuba, nor upon any party or faction among them, but to protect them in their homes, in their employments, and in their personal and religious rights. All persons who, either by active aid or honest submission, co-operate with the United States in its efforts to give effect to this beneficient purpose will receive the reward of its support and protection. Our occupation should be as free from severity as possible.

Though the powers of the military occupant are absolute and supreme, and immediately operate upon the political condition of the inhabitants, the municipal laws of the conquered territory, such as affect private rights of person and property and provide for the punishment of crime, are considered as continuing in force, *so far as they are compatible with the new order of things*, until they are suspended or superseded by the occupying billigerent; and in practice they are not usually abrogated, but are allowed to remain in force and to be administered by the ordinary tribunals substantially as they were before the occupation. This enlightened practice is, so far as possible, to be adhered to on the present occasion. The judges and the

other officials connected with the administration of justice may, *if they accept the supremacy of the United States*, continue to administer the ordinary law of the land as between man and man under the supervision of the American commander in chief. The native constabulary will, so far as may be practicable, be preserved. The freedom of the people to pursue their accustomed occupations will be abridged only when it may be necessary to do so.

While the rule of conduct of the American commander in chief will be such as has just been defined, it will be his duty to adopt measures of a different kind if, unfortunately, the course of the people should render such measure indispensable to the maintenance of law and order. He will then possess the power to replace or expel the native officials in part or altogether, to substitute new courts of his own constitution for those that now exist, or to create such new supplementary tribunals as may be necessary. In the exercise of these high powers the commander must be guided by his judgment and his experience and a high sense of justice.

One of the most important and most practical problems with which it will be necessary to deal is that of the treatment of property and the collection and administration of the revenues. It is conceded that all public funds and securities belonging to the Government of the country in its own right and all arms and supplies and other movable property of such Government may be seized by the military occupant and converted to his own use. The real property of the State he may hold and administer, at the same time enjoying the revenues thereof; but he is not to destroy it save in the case of military necessity. All public means of transportation, such as telegraph lines, cables, railways, and boats, belonging to the state, may be appropriated to his use, but unless in case of military necessity they are not to be destroyed. All churches and buildings devoted to religious worship and to the arts and sciences, all schoolhouses, are, so far as possible, to be protected, and all destruction or intentional defacement of such

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places, of historical monuments or archives, or of works of science or art is prohibited save when required by urgent military necessity.

Private property, whether belonging to individuals or corporations, is to be respected, and can be confiscated only for cause. Means of transportation, such as telegraph lines and cables, railways, and boats, may, although they belong to private individuals or corporations, be seized by the military occupant, but unless destroyed under military necessity are not to be retained.

While it is held to be the right of the conquerer to levy contributions upon the enemy in their seaports, towns, or provinces which may be in his military possessions by conquest, and to apply the proceeds to defray the expenses of the war, this right is to be exercised within such limitations that it may not savor of confiscation. As the result of military occupation the taxes and duties payable by the inhabitants to the former government become payable to the military occupant, unless he sees fit to substitute for them other rates or modes of contribution to the expenses of the government. The moneys so collected are to be used for the purpose of paying the expenses of government under the military occupation, such as the salaries of judges and the police, and for the payment of the expenses of the army.

Private property taken for the use of the army is to be paid for when possible in cash at a fair valuation, and when payment in cash is not possible receipts are to be given.

All ports and places in Cuba which may be in the actual possession of our land and naval forces will be opened to the commerce of all neutral nations, as well as our own, in articles not contraband of war, upon payment of the prescribed rates of duty which may be in force at the time of the importation.

WILLIAM MCKINLEY."

This order is in identically the same language as the executive order issued to the Secretary of War on the sending of an army of occupation to the

Philippines after the destruction of the Spanish fleet at Manila.

Cuba is treated as "enemy's country," its possession and occupation by the American forces are regarded as the exercise of a belligerent right resulting from the invasion and conquest of Spanish territory, and the President assumes to apply to it the same rules which, in time of war, a military commander, under the laws of war, is justified in invoking when he occupies by force the hostile territory of an enemy.

The order placed the island of Cuba and the Philippine Islands in precisely the same position, quite regardless of the fact that the President had declared the people of the island of Cuba to be free and independent, and that their territory was friendly ground, and we their allies in a joint war against Spain, whose sovereignty in Cuba the President had determined was entirely extinguished at the time of the joint resolution.

17. *The Protocol of August* 12, 1898.

On the 12th of August the following protocol was signed between the representatives of the United States and Spain:

> "1. That Spain will relinquish all claim of sovereignty over and title to Cuba.
>
> 2. That Porto Rico and other Spanish islands in the West Indies and an island in the Ladrones, to be selected by the United States, shall be ceded to the latter.
>
> 3. That the United States will occupy and hold the city, bay and harbor of Manila, pending the conclusion of a treaty of peace which shall determine the control, disposition and government of the Philippines.
>
> 4. That Cuba, Porto Rico and other Spanish islands in the West Indies shall be immediately evacuated, and that commissioners, to be appointed within ten days, shall within thirty days from the signing of the protocol meet at Havana and San Juan, respectively,

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to arrange and execute the details of the evacuation.

5. That the United States and Spain will each appoint not more than five commissioners to negotiate and conclude a treaty of peace. The commissioners are to meet at Paris not later than the first of October.

6. On the signing of the protocol hostilities will be suspended, and notice to that effect will be given as soon as possible by each Government to the commanders of its military and naval forces."

30 Stat., 1742.

18. *The Treaty of Paris.*

On the day the protocol was signed the President instructed the United States military and naval commanders to cease hostilities, and the blockades of Cuba, Porto Rico and Manila were lifted.

The protocol was followed by the appointment of commissioners by the two governments, who met in Paris. Sessions were held from time to time until November 21st, when the treaty was agreed upon. It was signed December 12th.

The treaty, so far as its provisions can in any way affect the present case, is as follows:

> ARTICLE I. Spain relinquishes all claim of sovereignty over and title to Cuba.
>
> And as the island is, upon the evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may, under international law, result from the fact of its occupation for the protection of life and property.
>
> ARTICLE II. Spain cedes to the United States the Island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and the Island of Guam, in the Marianas or Ladrones.
>
> ARTICLE III. Spain cedes to the United States the archipelago known as the Philippine Islands.
>
> * * * * *

ARTICLE VI. Spain will, upon the signature of the present treaty, release all prisoners of war and all persons detained or imprisoned for political offenses in connection with the insurrection in Cuba and the Philippines and the war with the United States.

Reciprocally the United States will release all persons made prisoners of war by the American forces, and will undertake to obtain the release of all Spanish prisoners in the hands of the insurgents in Cuba and the Philippines.

The Government of the United States will, at its own cost return to Spain and the Government of Spain will at its own cost return to the United States, Cuba, Porto Rico and the Philippines, according to the situation of their respective homes, prisoners released or caused to be released by them, respectively, under this article.

ARTICLE VII.—The United States and Spain mutually relinquish all claims for indemnity, national and individual, of every kind, of either Government, or of its citizens or subjects, against the other Government which which may have arisen since the beginning of the late insurrection in Cuba and prior to the exchange of ratifications of the present treaty, including all claims for indemnity for the cost of the war. The United States will adjudicate and settle claims of its citizens against Spain relinquished in this article.

ARTICLE VIII.—In conformity with the provisions of Articles I., II. and III. of this treaty, Spain relinquishes in Cuba and cedes in Porto Rico and other islands in the West Indies, in the island of Guam, and in the Philippine Archipelago all the buildings, wharves, barracks, forts, structures, public highways and other immovable property which in conformity with law belong to the public domain and as such belong to the Crown of Spain.

* * * * *

ARTICLE IX.—Spanish subjects, natives of the Peninsular, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their right to sell

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or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain the territory they may preserve allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside.

The civil rights and political status of the native inhabitants of the territory hereby ceded to the United States shall be determined by Congress.

ARTICLE X.—The inhabitants of the territory over which Spain relinquishes or cedes her sovereignty shall be secured in the free exercise of their religion.

ARTICLE XI.—The Spaniards residing in the territories over which Spain by this treaty cedes or relinquishes her sovereignty shall be subject in matters civil as well as criminal to the jurisdiction of the courts of the country wherein they reside, pursuant to the ordinary laws governing the same; and they shall have the right to appear before such courts and to pursue the same course as citizens of the country to which the courts belong.

ARTICLE XII.—Judicial proceedings pending at the time of the exchange of ratifications of this treaty in the territories over which Spain relinquishes or cedes her sovereignty shall be determined according to the following rules:

First: Judgments rendered either in civil suits between private individuals or in criminal matters, before the date mentioned, and with respect to which there is no course or right to review under the Spanish law, shall be deemed to be final, and shall be executed in due form by competent authority in the territory within which such judgments should be carried out.

Second: Civil suits between private individuals which may on the date mentioned be

undetermined shall be prosecuted to judgment before the court in which they may then be pending, or in the court that may be substituted therefor.

Third: Criminal actions pending on the date mentioned before the Supreme Court of Spain against citizens of the territory which by this treaty ceases to be Spanish shall continue under its jurisdiction until finall judgment; but such judgment having been rendered, the execution thereof shall be committed to the competent authority of the place in which the case arose.

ARTICLE XIII.—The rights of property secured by copyright and patents acquired by Spaniards in the island of Cuba, and in Porto Rico, the Philppines and other ceded territories, at the time of the exchange of the ratifications of this treaty, shall continue to be respected. Spanish scientific, literary and artistic works not subversive of public order in the territories in question shall continue to be admitted free of duty into such territories for the period of ten years, to be reckoned from the date of the exchange of the ratifications of this treaty.

ARTICLE XIV.—Spain shall have the power to establish consular officers in the ports and places of the territories the sovereignty over which has either been relinquished or ceded by the present treaty.

* * * * * *

ARTICLE XVI.—It is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof; but it will upon the termination of such occupancy advise any Government established in the island to assume the same obligations.

30 Stat., 1754.

On January 4, 1899, the treaty was transmitted to the Senate by the President with a report of the American Commissioners and copies of statements made before them. The treaty was ratified on the 6th of January.

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It was signed on March 17th by the Queen Regent of Spain. Ratifications were exchanged in Washington, and the treaty was proclaimed by the President on the 11th of April.

30 Stat., 1754.

19. *The Secretary of War, by direction of the President, creates a military division, to be known as the "Division of Cuba," under command of a United States Army officer, who is designated "Military Governor of the Island."*

The day after the treaty was signed (December 13, 1898), the following order was issued by the Secretary of War:

> "By direction of the President, a division to be known as the Division of Cuba, consisting of the geographical departments and provinces of the island of Cuba, with headquarters in the City of Havana, is hereby created, under command of Maj.-Gen. John R. Brooke, U. S. A., who, in addition to command of the troops in the division, will exercise the authority of military governor of the island.
>
> R. A. ALGER,
> Secretary of War."

General Brooke's Civil Report, 1898,* p. 1.

General Brooke proceeded to Havana, Cuba, arriving on December 27. On the following day he issued the following order, viz:

---

* Gen. Brooke's report was printed pursuant to a concurrent resolution (No. 11, Feb. 12, 1900) which provided "that there be printed seven thousand copies of so much of the civil reports of Major-General John R. Brooke, Military Governor of the Island of Cuba, made to the Adjutant-General of the United States Army, with accompanying papers and documents, as is in the English language, together with a prepared index, of which 2,000 copies shall be for the use of the Senate, 4,000 copies for the use of the House of Representatives, and 1,000 for the use of the War Department." The Deficiency Appropriation Bill (Chap. 785), passed July 6, 1900, provided for the payment of the expense of printing the report.

"General Orders, }
No. 1. }
HEADQUARTERS' DIVISION OF CUBA,
HAVANA, December 28, 1898.

In accordance with the order of the President, * * * the undersigned hereby assumes command of the Division of Cuba, and by the requirements of the same order will exercise the authority of military governor of the island of Cuba.

JOHN R. BROOKE,
Major-General, U. S. A.

Ibid.

20 *Spanish sovereignty in Cuba is formally relinquished and transferred to the Military Governor in the name of the United States.*

At noon, on January 1, 1899, accompanied by his staff, and a number of Cuban generals, General Brooks proceeded to the palace of the Spanish Governor-General,

> " where the relinquishment of Spanish sovereignty in Cuba was formally made to the United States Evacuation Commission, which immediately *transferred to the military governor of Cuba, in the name of the United States, the sovereingty* thus relinquished."
>
> *Ibid.*, p. 2.

The formal and complete evacuation of the island by the Spanish army was accomplished on February 6, 1899.

Ibid.

21. *The Cuban Army disbands.*

A perplexing question confronting the President after the restoration of peace was the disposition to be made of the Cuban Army.

The American forces sent to Cuba under General Shafter consisted of but 17,000 men, and at no time did the American troops stationed there during the war exceed that number. The army of occupation

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only numbered about 22,000, whereas the muster rolls of the Cuban army showed a force of 48,000.

General Brooks' Civil Report, 1899, p. 6.

The Cubans were not agreed among themselves as to the course to be followed, but a commission was sent to Washington to discuss the matter with our officials. After conferences with the President and his advisers an agreement was reached whereby the Cubans were to disband and surrender their arms, provided the sum of $3,000,000 was distributed among them.

This was followed by the incorporation in the Act of January 5, 1899, entitled "An Act making appropriations to supply urgent deficiencies in the appropriation for the support of the military and naval establishments for the last six months of the fiscal year ending June 30, 1899, and for other purposes" of the following provision:

"MILITARY ESTABLISHMENT,

Office of the Secretary of War.

For emergency fund to meet unforeseen contingencies constantly arising, to be expended at the discretion of the President, three million dollars."

30 Stat., 772.

The fund thus appropriated was credited to the Pay Department of the Army on the books of the Treasury Department, and the War Department was charged with the accounting and auditing and distribution of the fund by order of the Secretary of War.

The money was distributed between May 27 and September 12, 1899. 33,930 non-commissioned officers and enlisted men were paid $75 each, or $2,544,750 in all, and on September 21st the unexpended balance of $455,250 was turned back into the Treasury to the credit of the fund named.

Apparently no Executive order was signed by the President, the order of the Secretary of War being considered sufficient authority.

Speaking of the distribution of this fund, General Chaffee says:

> "Pursuant to arrangements, $3,000,000 were received at Havana, on March 17, for disbursement to the Cuban army. It was at first proposed to distribute $100 to each officer and man, on the general assumption that the army did not exceed 30,000. It was decided to exclude all officers; also all men who were known to have employment at monthly wages paid by the State. * * * On May 27, the first payment was made. * * * The rolls as prepared and delivered to the paymasters, footed *39,966 men.* Forty thousand was used as a devisor, instead of 30,000, allowing to each man $75."
>
> Report of Brig. Gen. Adna R. Chaffee, U. S. V., Chief of Staff, to Maj.-Gen. Brooke, Military Governor, October 20, 1899, printed in Gen. Brooke's Civil Report for 1899. Report of Secretary of War, Vol. I., Part 6, p.129.

Regarding the disbandment of the Cuban army and the distribution of this fund among its members, General Brooke says:

> "Outside of the principal towns the retiring Spanish army was closely followed *by the Cuban army,* which took charge of the towns and country, maintaining order, and, generally, performing police duty. This state of affairs continued, substantially, until the final disbandment of that army. The disbandment of the Cuban army was commenced in November, 1898, but only such as could procure work, or were anxious to resume their former vocations, seem to have taken advantage of the 'licencia' (furlough) which was given to many. A large part of the army was held together on various pretexts until the distribution of the $3,000,000 and the giving up of their arms effected a final disbandment.

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During the time the army was held together as an organized body the police duties performed seemed to be well done and order was preserved.

The spectacle of an army of, according to the rolls, *48,000 men* being peacefully dispersed among the people has for its prototype the disappearance of the great volunteer army of the United States in 1865. In neither case has there been any great disturbance as was feared in both cases, and particularly so as regards the Cuban army. The small attempts at brigandage were quickly suppressed, the lawbreakers placed in prison, and the courts are now hearing their cases. * * *

The desire of a large body of the Cuban army to take part on the 1st of January in the ceremonies of the relinquishment of sovereignty by Spain was reported verbally, by General Ludlow, and he was informed that the danger to life and property was too great, and that the celebration must be postponed to a time when the excitement had cooled off and the passions of the people could be under control. This celebration afterwards took place on the arrival in the city of Gen. Maximo Gomez, Commander in-Chief of the Cuban forces, on February 24. General Ludlow was directed to meet General Gomez at the city limits and show him every courtesy possible. The Quinta de los Molinos, the summer residence of the Governor-General, was placed at his disposal, and for several months he, with his staff and escort, occupied the houses and grounds as the guests of this Government."

Gen. Brooke's Civil Report for 1899, pp. 6–7.

"Mr. Robert P. Porter arrived at Habana on or about January 30, with letters from the Secretary of War, which explained the object of his visit and indicated the desire of the President that Mr. Porter be aided in carrying out the purpose of his coming. After a conference with the Military Governor, in which the purpose of his visit was fully made known, arrangements were hastily made for the journey to his destination. At Mr. Porter's request, an officer of the Military Gov-

ernor's staff, Capt. J. A. Campbell, was directed to accompany him. On his return, Mr. Porter announced the success of his mission and left almost immediately for Washington. A note to General Gomez was taken to him by Mr. Porter, in which the General was cordially invited to come to Habana and confer with the Military Governor as to the distribution of the $3,000,000 which had been allotted for the purpose of aiding the soldiers of the Cuban army to return to their homes, and, so far as was possible, to enable them to re-establish their homes and resume their vocations. General Gomez replied, saying that he would proceed to Habana at an early day and that he would do all in his power to accomplish the purpose.

General Gomez reached Habana late in February, and after several conferences with the Military Governor, a plan was determined upon to distribute the money among the Cuban soldiery. The money in the meantime arrived, was placed on an army transport and safeguarded by a strong detachment of United States infantry.

The Cuban Army Assembly was in session during this time and developed a strong opposition to General Gomez, which delayed the preparation of the rolls of the various bodies of troops. Finally, the Assembly deposed General Gomez by abolishing the grade he occupied. This created a serious delay, as the data on which to base the rolls was under its control and could not be obtained. The Military Governor continued to recognize General Gomez as the representative of the Cuban army."

Ibid, p. 16.

22. *Of the administration of the affairs of Cuba by the President, and of the courts through which he assumes to administer justice.*

The permanent military regimé in Cuba was inaugurated by the publication of the following proclamation:

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"HEADQUARTERS DIVISION OF CUBA,
HABANA, JANUARY 1, 1899.

TO THE PEOPLE OF CUBA:

Coming among you as the representative of the President, in furtherance and in continuation of the humane purpose with which my country interfered to put an end to the distressing condition in this island, I deem it proper to say that the object of the present Government is to give protection to the people, security to person and property, to restore confidence, to encourage the people to resume the pursuits of peace, to build up waste plantations, to resume commercial traffic, and to afford full protection in the exercise of all civil and religious rights.

To this end, the protection of the United States Government will be directed, and every possible provision made to carry out these objects through the channels of civil administration, although under military control, in the interest and for the benefit of all the people of Cuba, and those possessed of rights and property in the island.

The civil and *criminal code* which prevailed prior to the relinquishment of Spanish sovereignity *will remain in force, with such modifications and changes as may from time to time be found necessary in the interest of good government.*

The people of Cuba, without regard to previous affiliations, are invited and urged to co-operate in these objects by exercise of moderation, conciliation, and good will one toward another, and a hearty accord in our humanitarian purposes will insure kind and beneficent government.

The military governor of the island will always be pleased to confer with those who may desire to consult him on matters of public interest.

JOHN R. BROOKE,
Major-General, Commanding Division of Cuba and Military Governor."

Gen. Brooke's Civil Report, p. 7.

Since that time the President, through the instrumentality of the military governor and the troops

of the United States, has governed the Island of Cuba by martial law.

The military governor assumes to exercise and has in fact exercised, absolute executive, legislative and judicial power over the affairs of the island and its people, and rules the island by his sole and uncontrolled will, subject to no supreme authority save that of the President, who adopts the orders and decrees the military governor if he does not revoke them. In the exercise of the authority which he assumes to possess, the military governor has taken into his hands and subjected to his absolute power all the departments of government in Cuba. He assumes and exercises absolute power and authority over all persons and all property. He assumes to enact, modify, amend or repeal laws, establish, reorganize or abolish courts, civil and criminal, adopt or change rules of judicial procedure, and in general to deal with the administration of justice in the island as he sees fit.

Record, pp. 4–5.

He accords to accused persons none of the rights and privileges guaranteed by the Constitution, *e. g.*, *habeas corpus*, indictment by a grand jury, trial by jury, &c.

On the 11th day of January, 1899, he issued a military edict or order, whereby he established four departments of the "civil" government, to be known as the department of state and government, the department of finance, the department of justice and public instruction, and the department of agriculture, commerce, industries and public works, each under the charge of a secretary; and on the following day he announced his appointment of secretaries of each department.

Record, p. 5; Gen. Brooke's Civil Report, p. 8.

On the 14th of April, 1899, he published a military order creating a supreme court, with jurisdiction

throughout Cuban territory, composed of a president or chief justice, six associate justices, one fiscal, two assistant fiscals, one secretary or chief clerk, two deputy clerks, and other subordinate employees, with administrative functions as well as those of a court of justice in civil and criminal matters.

Record, p. 5; Gen. Brooke's Civil Report, p. 34.

By article XXXVII. of this same order he declared that to be eligible for appointment to the office of president, justice, fiscal, assistant fiscal, or deputy clerk of the supreme court the person must (among other things) be a Cuban or provided he was a person included within the provisions of article 9 of the Treaty of Paris declare on oath that he accepted Cuban citizenship.

Record, p. 5; Gen. Brooke's Civil Report, p. 38.

On the 15th of June, 1899, he issued a military edict or order creating and prescribing the jurisdiction of the "audiencias," of the island, or ordinary courts for the trial of criminal offences.

Record, pp. 5-6; Gen. Brooke's Civil Report, p. 49.

By article XLI. of the same order he declared article XXXVII. (before mentioned) of the order creating the supreme court applicable to the functionaries of the "audiencia."

Ibid, p. 53.

The supreme court, the "audiencias," and certain tribunals called "courts of first instance" are the only courts in Cuba exercising or assuming criminal jurisdiction. All of them are organized, controlled, and operated by the military governor, who assumes power to appoint, suspend, and remove

their members, officers, and employees at his pleasure. They act as the mere agents and instruments of the military governor, and are wholly dependent for their existence and continuance upon his will.

Record, p. 6.

Under the system now in force there is no means of trying offenders against the laws in force in Cuba (whatever these laws may be), except through the instrumentality of these courts, or of such others as the military governor may see fit to create.

Ibid.

As we have seen, he does not regard the Constitution as in the least limiting or restricting his governmental power, for he denies to accused persons the dearest rights accorded by that instrument.

The decrees having relation to the organization of the courts and on kindred subjects will be found in Gen. Brookes' report.

There is no reason for referring more particularly to these decrees or to the various other military edicts of the military governor. Their contents are quite immaterial. The point is that they demonstrate that the government in vogue in Cuba is that of a military dictatorship. If the military governor can enact legislation he can modify or appeal it at his pleasure—at any time, and in any manner. Hence, even since this case arose the entire system may have been abolished, and some other system of which we are wholly ignorant have been substituted.

It must not be supposed, because the Military Governor has heretofore permitted the courts in Cuba as now constituted to administer criminal justice, that the appellant must necessarily be tried in those courts.

He, the military governor, can (if he has the power he assumes to exercise) at any moment abolish those courts and establish such others as he chooses.

For it must be borne in mind that his will is the only law in force in Cuba.

23. *The system of penal laws in vogue in Cuba before the American intervention, which (with but slight modifications) the Military Governor assumes to now enforce.*

When the United States military authorities entered upon the occupation of the Island of Cuba the government was that of monarchical Spain, modified by the so-called system of autonomy which had been in existence for about a year, and which was a concession to the protests of the United States against the long-existing oppression of the Cuban people formerly pursued by the Spanish rulers.

Major Edgar S. Dudley, U. S. V., Judge Advocate of the Division of Cuba, in a report to the Adjutant-General dated September 30, 1899, and printed in General Brooke's Civil Report, at page 163, says:

> "The laws existing were those of the Latin-speaking races of people generally existing under a monarchical form of government. While the laws themselves provide in most instances proper remedies, the law of procedure and the administration of the laws were entirely antagonistic to all modern methods of practice and recognition of the personal rights of men. The Courts were said, and appeared from satisfactory indications, to be corrupt-largely due to the methods pursued in crim, inal cases."

Again at page 165 he says:

> "The law of procedure, especially in criminal cases, was not based upon any consideration of the rights of men, but rather appears to have been a relic of the dark ages, with a slight touch of the inquisition in the powers held by judges under the 'incomunicado' which existed. Much injustice and many hardships have been due to the absence of those remedial writs which give to the Anglo-Saxon legal assurance of proper regard for his personal rights of liberty and to property."

In the report of Mr. Pablo Disvernine, Secretary of Finance, to General Brooke, dated October 1, 1899, that gentleman, himself a native Cuban, speaking of the Spanish Code (under which one of the charges against the appellant was instituted), said:

> "The Penal Code was the principal and most efficient instrument devised for the violation of the constitutional guarantees under the disguise of pretending to secure and to sanction with the penalty of the law, the abuse or misuse of said constitutional rights."

It is true that the Military Governor has undertaken to abolish or ameliorate some of the more flagrant evils of the old system; but notwithstanding his benevolent attempts in this direction, the present condition of affairs, so far as the administration of criminal justice is concerned, is abhorrent to every principle of American law and justice. The mere fact of accusation raises the presumption of guilt and accused persons are dealt with upon that presumption through all stages of criminal proceedings. There is no presentment or indictment by a Grand Jury. There is no right to trial by jury. The writ of *habeas corpus* is unknown. The courts are composed of judges selected by the military authorities, and hold office during their pleasure. The entire system is under the absolute control of the Military Governor. He can appoint or remove the officers of the court as he sees fit. The old Spanish system, with the slight modifications referred to, remains practically unchanged. As Mr. J. A. Gonzalez Lanuza, Secretary of Justice and Public Instruction, said in his report of September 16, 1899 (p. 253):

> "The legal system—the system as a whole, remains unchanged because there was neither time nor opportunity to change it."

Although General Brooke in his final report of December 20, 1899 (p. 428) says that the introduction of the writ of *habeas corpus* "has been *under con-*

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sideration for some time," the idea of substituting the presumption of innocence, which is one of the fundamental principles of our American system, for that of guilt, or of giving the accused the right to a trial by jury, has apparently never been thought of.

The views of the present military governor are interesting and in point:

> "Under the existing condition of things in Cuba no means are provided for the trial of * * * civilian employes of the military establishment for offenses not cognizable under the articles of war, *except the Cuban Courts* * * * I do not believe that it is wise or prudent, or in any way desirable to subject American citizens, who are in the service of their own government, to the jurisdiction and capricious decisions of tribunals composed of persons *alien in race and sentiment, administrating a system of laws with which Americans are entirely unfamiliar, and which would not be tolerated in any American community.*"
>
> Special report on Insular affairs, &c., October 5, 1899, by Brig.-Gen. Leonard Wood, U. S. V., then commanding department of Santiago and Puerto Principe, Cuba, and now Military Governor of the Island of Cuba. Washington, Government Printing Office, 1899.

II.

Of the status of Cuba since the late intervention and the relations between the United States and the Cuban people, as shown by congressional legislation.

(*a.*) On the 18th of May, 1898, Congress passed an act entitled "An act to provide assistance to the in-

habitants of Cuba, and arms, munitions and military stores to the people of the Island of Cuba, and for other purposes," providing as follows:

> "That while serving in Cuba during the existing war, officers of the Army of the United States exercising separate command, may, by special order, cause subsistence, medical and quartermaster's supplies to be issued to, and other aid rendered to inhabitants of the Island of Cuba, who are destitute and in imminent danger of perishing unless they receive the same.
>
> Sec. 2. That the President and general officers comanding troops in Cuba are hereby authorized to furnish to the Cuban people such arms, ammunition, equipments, and military stores and supplies as they may require in order to increase their effective fighting force in the existing war against Spain."
>
> 30 Stat., 419.

(*b*.) By Chap. 423 (Army appropriation bill, Approved March 3, 1899), commonly spoken of as the Foraker amendment, it was provided:

> "Sec. 2. That no property, franchises or concessions of any kind whatever shall be granted by the United States, or by any military or other authority whatever, in the Island of Cuba during the occupation thereof by the United States."
>
> 30 Stat., 1074.

(*c*.) The same Act provided, for—

> "Subsistence supplies to be issued to inhabitants of the island of Cuba who are destitute and in imminent danger of perishing unless they receive the same, one hundred thousand dollars."
>
> *Ibid.*, p. 1069.

(*d*.) 31 Stat., 27, entitled "An act relating to Cuban vessels, approved Feb. 10, 1900, is as follows:

> "That vessels owned by citizens of Cuba, and documented as such by officers of the

United States, shall hereafter be entitled in ports of the United States to the rights and privileges of vessels of the most favored nation, and they and their cargoes shall be subject to no higher charges in ports of the United States than are imposed on the vessels and cargoes of the most favored nation in the same trade.

Sec. 2. That the Secretary of the Treasury is hereby authorized to refund * * * upon application and satisfactory evidence, tonnage taxes and light dues which have been imposed on vessels owned by citizens of Cuba entering ports of the United States since April 11, 1899, which have been in excess of the tonnage taxes prescribed by Section 11 of the act of June 19, 1886."*

III.

Of the so-called "Department of Posts" of the Island of Cuba, and of the "Postal Code," proclaimed by the Military Governor.

(a.) *Of the Cuban postal service established by the President.*

1. By the Act of June 6, 1895, entitled, "AN ACT TO AUTHORIZE THE ESTABLISHMENT OF POST-OFFICES AT MILITARY POSTS OR CAMPS," it was provided:

"That during the continuance of the existing war the Postmaster-General may, in his

* Section 11 of the act of June 19, 1886, is as follows:

"SEC. 11. That section fourteen of 'An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying-trade, and for other purposes,' approved June 24th, 1884, be amended so as to read as follows:

SEC. 14. That in lieu of the tax on tonnage of thirty cents per ton per annum imposed prior to July first, eighteen hundred and eighty-four, a

discretion, establish a temporary post office at any military post or camp for the purpose of supplying the officers and troops there encamped with mails, the location of which post-office may at any time be changed to any other post or camp. On the establishment of such post-office he shall co-operate with the Secretary of War or officer commanding such post or camp for the purpose of securing the detail of an officer of the Regular or Volunteer Army of suitable rank to act as postmaster," &c.

"In any case where it is deemed impracticable by the military authorities to detail persons from the Army to act as postmaster or clerks the Postmaster-General is authorized to appoint a civilian as postmaster," &c.

30 Stat., 432.

2. On the 21st of July, 1898, the President issued the following executive order:

"In view of the occupation of Santiago de Cuba by the forces of the United States, it is ordered that postal communication between the United States and that port, which has been suspended since the opening of hostilities with Spain, may be resumed, subject to such military regulations as may be deemed necessary. As other portions of the *enemy's territory* come into the possession of the land and naval forces of the United States, postal

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duty of three cents per ton, not to exceed in the aggregate fifteen cents per ton in any one year, is hereby imposed at each entry on all vessels which shall be entered in any port of the United States from any *foreign port or place* in North America, Central America, the West India Islands, the Bahama Islands, the Bermuda Islands, or the coast of South America bordering on the Caribbean Sea, or the Sandwich Islands, or Newfoundland;

And a duty of six cents per ton, not to exceed thirty cents per ton per annum, is hereby imposed at each entry upon all vessels which shall be entered in the United States from any *other foreign ports*, not, however, to include vessels in distress or not engaged in trade;

Provided, That the President of the United States shall suspend the collection of so much of the duty herein imposed, on vessels entered from any *foreign port*, as may be in excess of the tonnage and light-house dues, or other equivalent tax or taxes, imposed in said port on American vessels by the Government of the *foreign country* in which such port is situated, and shall, upon the passage of this act, and from time to time

communication may be opened under the same conditions. * * * The revenues derived from such service are to be applied to the expenses of conducting it, and the United States postage stamps are therefore to be used. The Postmaster-General is charged with the execution of this order in co-operation with the military commander, to whom the Secretary of War will issue the necessary directions."

Messages and Papers of the Presidents, Vol. X., p. 216.

Report of the Postmaster-General, Nov. 21, 1898. Messages and Documents, 1898–1899, Vol. 2, pp. 1564–1565.

3. Speaking of the introduction of the postal service in Cuba, pursuant to the directions of this order, the Postmaster-General said in November, 1898:

"When our troops advanced into Cuba the postal service moved with them. Upon the surrender of Santiago de Cuba the postal agent of the United States, under the authority of the President and in co operation with

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thereafter as often as it may become necessary by reason of changes in the laws of the *foreign countries* above mentioned, indicate by proclamation the ports to which such suspension shall apply, and the rate or rates of tonnage-duty, if any, to be collected under such suspension.

Provided further, That such proclamation shall exclude from the benefits of the suspension herein authorized the vessels of any *foreign country* in whose ports the fees or dues of any kind or nature imposed on vessels of the United States, or the import or export duties on their cargoes, are in excess of the fees, dues, or duties imposed on the vessels (4) of the country in which such port is situated, or on the cargoes of such vessels;"

Section 12 of the same act provides: "That the President be, and hereby is, directed to cause the Government of *foreign countries*, which, at any of their ports, impose on American-vessels a tonnage tax or light-house dues, or other equivalent tax or taxes, or any other fees, charges, or dues, to be informed of the provisions of the preceding section, and invited to co-operate with the Government of the United States in abolishing all light-house dues, tonnage-taxes, or other equivalent tax or taxes on, and also all other fees for official services to, the *vessels of the respective nations* employed in the trade between the ports of such *foreign country* and the ports of the United States." Supp. to U. S. Rev. Stat., Vol. I. (1874–1891), Ch. 421.

the military commander, took possession of the post office of that city, which was made the military post office. He dispensed with the services of the Spanish director and ten of his large force of clerks, retaining such as were needed as interpreters, and proceeded with a much smaller force to put the office on a better and more effective footing. * * *

"When Porto Rico and portions of Cuba and the Philippines passed into the military possession of the United States, measures for the continuance or restoration of general mail facilities seemed to be an essential element of the beneficent presence of American authority. By order of the President, the establishment of the postal service followed the extension of military occupation. In harmony with the general policy adopted for the administration of the civil institutions in the regions which thus came under our control, the local system and provisions were retained as far as practicable and adapted to our methods.

"At the same time it was constantly borne in mind that these measures were taken by virtue of military possession. The general postal service was associated with the military postal service and operated by the same machinery. No new appointments, save in one or two instances, were made. Trained men from our home service were detailed as superintendents and agents and placed in charge of the larger offices, retaining such of the old employees as were needed or could be made available. In the smaller places the old postmasters are continued or other local officers are found. There has already been a great improvement over the old Spanish service, and the work has only just begun."

4. Shortly after the Treaty of Paris was signed, namely, December 21, 1898, the Postmaster-General issued the following order:

"In accordance with the order of the President, dated July 21, 1898, authorizing the extension of the postal service over territory coming into military possession of the United

States, the island of Cuba having come into such possession, it is ordered that E. G. Rathbone, of the State of Ohio, be, and he is hereby appointed Director of Posts of Cuba at a salary of $4,000 per annum. He will have general supervision and control of the postal service of the island, co-operating with the military commander, and be subject to such rules and regulations as may from time to times be promulgated by the Post Office Department."

5. On the 1st of January, 1899, Mr. Rathbone formally received and took charge of the "Bureau of Communications," as the postal department at Havana had been called. He immediately proceeded to organize a "Department of Posts." He created various bureaus in the Department and defined the duties of each. The first of these was the Bureau of Finance, created by Order No. 6, on the 7th day of January, 1899.

Report of Mr. E. G. Rathbone, Director-General of Posts, to Major General John R. Brooke, "Governor-General" of Cuba, August 28, 1899. Report of the War Department, 1899 (Civil Report of General Brooke), Vol. I, Part 6, pp. 414–415.

To the Bureau of Finance was assigned the charge and custody of postage stamps, stamped envelopes and postal cards; the supplying of postmasters upon their requisitions for these supplies, and also the furnishing of all other supplies, printing, stationery, &c., for the Department and the postmasters throughout Cuba.

Ibid, p. 416.

The appellant, who is a native-born citizen of the United States and an inhabitant of the State of Indiana, was the head of this bureau.

Transcript of Record, pp. 9 (17), 10 (20), 12 (23), 13 (25), 15 (29).

The appellant is not enlisted or commissioned in the United States military service, but is a civilian.

(*b.*) *Of the "Postal Code."*

This so-called "Postal Code" was the creation of the Military Governor, and its validity rests upon his power and authority as the military representative of the President. It originally appeared in the form of the following military order:

> "No. 115. HEADQUARTERS, DIVISION OF CUBA.
> HAVANA, July 21, 1899.
>
> "By direction of the Military Governor, the following Postal Code is hereby promulgated and declared to be the law relating to Postal affairs in Cuba.
>
> "All laws and parts of laws heretofore and now existing in the Island of Cuba inconsistent with the provisions of this order are hereby declared null and void.
>
> "SECTION I.
>
> "*Duties of Director-General of Posts.*
>
> "The Director-General of Posts of the Island of Cuba, appointed by the Postmaster-General of the United States and subject to his authority, shall have control and management of the Department of Posts.
>
> "It shall be his duty to establish such general offices and bureaus and service in connection therewith as in his judgment may be necessary to the proper conduct of the business of said Department, and to appoint persons to perform the duties appertaining thereto and to fix their compensation; and he is hereby invested with the power to remove such persons when in his judgment the good of said service requires it;
>
> To establish post-offices and discontinue the same when necessary, and appoint and remove postmasters and such other persons whose services may be connected with post offices as may be necessary to properly conduct the business thereof;
>
> To appoint all other persons employed in the transportation, collection and delivery of the mails, and for the performance of any other

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duty which in his judgment may be required; to fix the compensation of each, and to remove such persons when in his judgment such action may be necessary;

To establish and promulgate rules and regulations not inconsistent with the rules and instructions promulgated by the Secretary of War under date of May 11, 1899, to carry into effect the executive orders relating to the Military Government by the United States in the Island of Cuba, or such amendatory or supplementary orders as may hereafter be issued for said purpose, for the collection and disbursement of the revenues arising in the Department of Posts of Cuba, and to keep or cause to be kept proper accounts of all such receipts and expenditures;

To enter into contracts or agreements for the transportation of the mails over post roads in said island, and to prescribe such rules and regulations as may in his judgment be necessary to the enforcement of such contracts or agreements;

To enter into all such other contracts and agreements as in his judgment may be necessary to the proper conduct of the service of said department in all its branches, and to establish and promulgate rules and regulations therefor; and

To prescribe all rules and regulations, not inconsistent with existing laws in said island or such laws as may hereafter be enacted or promulgated, as in his judgment may be necessary for the management and conduct of the business of said department, and to do all things that may be necessary to give full force and effect to the powers hereby vested in him; and the rules and regulations heretofore adopted and promulgated by him are hereby ratified and continued."

General Brooke's Civil Report, p. 75.

Section 2 authorizes the Director-General of Posts to require bonds of postmasters, contractors and employees.

Section 4 declares that the term "island of Cuba,"

when "used in the laws herein promulgated," shall include

> "all the mainland and islands adjoining under the present government in control by virtue of the military occupation of the United States."

Section 5 declares that the term "dollars," when so used, shall be held to mean "dollars in money of the United States of America or their equivalent."

Sections 5 to 62, inclusive, define and affix penalties for various offenses against the Cuban postal system. These penalties range from small fines to life imprisonment (Sec. 27).

Section 37 is as follows:

> *Unlawful pledging or sale of stamps.*
>
> Whoever, being a postmaster or other person employed in any branch of the Department of Posts, and being intrusted with the sale or custody of postage stamps, stamped envelopes, or postal cards, shall issue or dispose of them in the payment of debts, or in the purchase of merchandise or other salable articles, or pledge or hypothecate the same, or sell or dispose of them except for cash or sell or dispose of postage stamps or postal cards for any larger or less sum than the values indicated on their faces, or sell or dispose of stamped envelopes for a larger or less sum than is charged therefor by the Department of Posts for like quantities; or sell or dispose of, or cause to be sold or disposed of, postage stamps, stamped envelopes, or postal cards at any point or place outside of the delivery of the office where the postmaster or other person is employed, or induce, or cause to be induced, for the purpose of increasing the emoluments or compensation of the office, any person to purchase postage stamps, stamped envelopes, or postal cards at the office where such postmaster or other person is employed when such person does not reside nor do business within the delivery of such post-office; or sell or dispose of postage stamps, stamped envelopes, or postal cards otherwise than as provided by law and the regulations of

the Department of Posts, shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars, or by imprisonment for not more than one year, or both such fine and imprisonment.

Section 55 is entitled "Misappropriation of money or property," and is as follows:

"Whoever, being a postmaster, assistant postmaster, cashier, or other person employed in or in any way connected with the business or operations of any branch of the service of the Department of Posts, shall convert to his own use any money, postage stamps, stamped paper, or other property of the Department of Posts, or in the custody of, or in use by, said Department, or postal, money order, or other funds coming into his hands in any manner whatever, or any money or property which may have come into his possession or under his control in the execution of such office, employment, or service, or under color or claim of authority as such officer, employee, or agent, whether the same shall be the money or property of the Department of Posts or in the custody of, or in use by said Department, or of some other person or party; or shall fail safely to keep any such money, stamps, stamped paper, postal, money order, or other funds, or other property, whether the same is the property of the Department of Posts or in the custody of, or in use by, said Department, or the property of some other person or party, without loaning, using, depositing in banks, except as authorized by the regulation of the Department of Posts, or exchanging for funds or property other than such as are especially allowed by the regulations of the Department of Posts; or shall fail to remit to or deposit at a designated depository, or turn over to the proper officer or officers, agent or agents, any such money, stamps, stamped paper, postal, money order or other funds, or other property, whether the same is the property of the Department of Posts or in the custody of, or in use by, said Department, or the property of some other person or party, when required so to do by law or the regulations of

the Department of Posts, or upon demand or order of the Director-General of Posts, either directly or through a duly authorized and accredited officer or agent of the Department of Posts, or shall advise or participate in any of the offenses defined in this section, shall for every such offense be punished by imprisonment for not less than six months nor more than ten years, or by a fine in a sum equal to the amount embezzled, or by both such fine and imprisonment; and any failure to produce any money, postage stamps, stamped paper, postal, money order or other funds, or other property, whether the property of the Department of Posts or in the custody of, or in use by, said Department, or the property of any other person or party, when required so to do as hereinbefore provided, shall be taken to be *prima facie* evidence of such offense. But nothing shall be construed to prohibit any postmaster from depositing, under the direction of the Director-General of Posts, in a bank designated by the Director-General of Posts for that purpose, or in any other place, provided the Director-General of Posts shall so specifically authorize, to his own credit as postmaster, any funds in his charge, nor prevent his negotiating drafts or other evidences of debt through such banks or otherwise, when instructed or required to do so by the Director-General of Posts, for the purpose of remitting surplus funds from one post-office to another or to a designated depository."

Section 63, entitled "Courts having jurisdiction to take cognizance of crimes against Department of Posts, &c.," provides that –

> "Judges of the First Instance and Instruction shall have and are hereby given jurisdiction and authority to take cognizance of the offenses herein enumerated, and hear testimony and make investigation as is now provided by law in other offenses, and if they shall determine from the evidence presented that there is probable cause to believe that the party accused is guilty of the offense charged against him, they shall admit such person to bail, or in default of good and sufficient

bail, commit him to jail to await the action of the Criminal Court having jurisdiction of the matter, as hereinafter provided;

Provided, That the offense shall have been committed in any part of the province in which the judicial district of the judge is located;

That the accused shall have been apprehended in any part of the province in which the judicial district of the judge is located; although the offense may have been committed elsewhere; and

That the accused shall have been apprehended out of the Island of Cuba and brought into the province in which the judicial district of the judge is located, without respect to where the offense may have been committed."

Section 64, entitled "Courts having jurisdiction to try offenses against Department of Posts," provides that—

> "Criminal Courts ('Audiencias de lo Criminal') shall have judisdiction in all cases herein set forth when the offense shall have been committed in the judicial district in which the court now has, by law, criminal jurisdiction, or without reference to where the offense shall have been committed if the accused shall have been apprehended in said district, or if the accused shall have been brought into said district, provided he shall have been apprehended out of the Island of Cuba."

IV.

Of the legislative history of the Act of June 6, 1900, under the provisions of which the appellant is restrained of his liberty.

On the 6th day of May, 1900, the appellant, who had returned to the United States on leave of ab-

sence on the 28th of April (Record, p. 16 [31-32]) was "indicted" in the City of Havana, in the Island of Cuba, for the crime of "embezzlement of public funds" to the amount of "ten thousand dollars and upwards," in violation of "Chapter X., Article 401 of the Penal Code,"* "an order being then and there regularly and duly entered to that effect by the Judge of the Court of the First Instance and Instruction of the Cathedral District of the City of Havana."

Transcript of Record, pp. 9–10.

On the same day the Judge in Havana directed that the appellant "should be arrested and that proper request should be made for his extradition."

Ibid., p. 10.

On the 18th day of May, 1900, the appellant was again "indicted" in Havana for the crime of "malversation of public funds" "to the amount and value of more than fifty-seven thousand dollars in gold coin of the United States currency," in violation of "Sections 37 and 55 of the Postal Code of the said Island of Cuba," alleged to have been committed "between the dates of July 1, 1899, and May 1, 1900."

Ibid., pp. 10–11.

On the same day (May 18, 1900) Major-General Leonard Wood, U. S. V., Military Governor of the Island of Cuba, addressed to the President a request for the appellant's extradition upon the latter charge.

Ibid., p. 11.

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* The Penal Code of Cuba and Porto Rico (*Codigo Penal para las Islas de Cuba y Puerto Rico*) was promulgated by a Spanish royal decree (*Royal Decreto*) of May 23, 1879. It was a revision of the Penal Code of June 17, 1870, and was undertaken upon the conclusion of the "Ten Years' War" in Cuba. Article 401 provides that: "The public employee who, by reason of his office, has in his charge public funds or property and who should take (or consent that others should take) any part therefrom, shall be punished," &c. (See Post, pp. 175–178).

At this time there was no treaty stipulation or act of Congress authorizing the appellant's extradition to Cuba.

On the 18th of May (the same day the Military Governor issued his requisition for the appellant's surrender on the charge of violating the "Postal Code"), two bills were introduced in the House of Representatives (56th Congress, 1st Session, H. R., 11,709 and 11,710).

The first was a proposed amendment to Section 5270 of the Revised Statutes, by way of a proviso authorizing the extradition of offenders against the criminal laws, orders, rules or regulations lawfully established by the United States, or its officers, or any department thereof, for the control or government of any foreign country or territory under the control or temporary government of the United States over which the United States had authorized or established governmental control.

The other (11,710) was introduced "*by request*."*

Section 1 provided

> "that sections 5270, 5271, 5272, 5273, and 5274 of the Revised Statutes, and all other statutes of the United States covering extradition to foreign countries in pursuance of treaties, shall apply to and govern extradition to the Island of Cuba while occupied by the United States, and during the continuance of the government maintained and established in said island by the United States, in the same manner and to the same effect as

* This bill was prepared by the Attorney General and had been submitted by him to the chairman of the House Committee on the Judiciary, by whom it was introduced, accompanied by a letter from the Attorney-General, in which the latter said: "Recent offenses of a criminal nature committed by an employee of the postal service in Cuba, who has fled from justice there and taken refuge in the United States, make it my duty to call your attention to the fact that the application of the present extradition laws of the United States to such cases is in a condition of doubt and uncertainty which makes it embarrassing to the Department of Justice," &c. "I have drafted an act which will make the course of procedure in such matte s sure and certain, and I respectfully ask that it be considered by your committee, and, if found expedient, that it be introduced and passed as speedily as possible."

though Cuba were a country with which a treaty existed stipulating and providing for extradition in the case of all felonies and other crimes, past and future, against the penal code or the laws in force in the island of Cuba, and in the same manner as if the governor or other chief officer of Cuba were the head of an independent government thereof."

SEC. 2 made it a misdemeanor to obstruct, resist, or oppose any agent, person, or officer having a prisoner in custody under the provisions of the section in the execution of his duties, or to rescue or attempt to rescue such prisoner.

By SEC. 3 it was proposed to make the provisions of sections 5278 and 5279 of the Revised Statutes apply to the rendition of fugitives from justice "between the several States and Territories of the United States and the several islands belonging to the United States by virtue of the Treaty of Paris."

On the 19th of May a bill was introduced in the House (H. R., 11,719) which was the framework of the statute as it was eventually enacted.

The three bills were referred to the House Committee on the Judiciary, which on the 22d of May reported the bill last mentioned with an amendment in the nature of a substitute. In the course of its report the committee said:

> The extradition laws of the United States provide for the removal to a foreign jurisdiction for trial of a person who has committed a crime in a foreign country or territory and fled from justice therein to the United States in those cases only where a treaty providing for extradition is in existence between the United States and such foreign country.
>
> Conditions have arisen demonstrating the necessity for additional legislation on this subject and the enactment of a law providing for the removal of such persons to a foreign country or territory for trial under the laws there in force when such foreign country or territory is occupied by the United States,

and therefore under its government or control, even though no treaty exists and such foreign country has no government competent to make a treaty. * * * Your committee therefore report the bill back with the recommendation that it pass when amended as follows: Strike out all after the enacting clause and insert the following:

That section fifty-two hundred and seventy of the Revised Statutes of the United States is hereby amended by adding thereto the following proviso:

"*Provided*, That whenever any foreign country or territory, or any part thereof, is occupied by the United States, any person who shall violate, or who has violated, any of the criminal laws in force therein, and who shall depart or flee, or who has departed or fled, from justice therein to the United States, shall, when found therein, be liable to arrest and detention by the authorities of the United States, and on the written request or requisition of the authorities in control of such foreign country or territory shall be returned and surrendered as hereinafter provided to such authorities for trial under the laws in force in the place where such offense was committed. All the provisions of sections fifty-two hundred and seventy to fifty-two hundred and seventy-seven of this title, so far as applicable, shall govern proceedings authorized by this proviso: *Provided further*, That such proceedings shall be had before a judge or a justice of the courts of the United States only, who shall hold such person on evidence establishing probable cause that he is guilty of the offense charged. If so held, such person shall be returned and surrendered to the authorities in control of such foreign country or territory on the order of the Secretary of State of the United States, and such authorities shall guarantee to such person a fair and impartial trial."

56th Congress, 1st Session, House Report No. 1652.

Meanwhile, on May 21st, two bills were introduced in the Senate and referred to the Committee

on the Judiciary. One of these (S. 4800) was introduced by Senator Fairbanks and the other (S. 4802) by Senator Hoar.

The measure proposed by Senator Fairbank was entitled "A Bill to require the President to cause to be surrendered to the governing authorities of Cuba, or any possessions of the United States, fugitives from justice, and for other purposes." It applied, as its title indicated, to fugitives charged with any offenses against the criminal laws of *Cuba*, *or* any of the *possessions* of the United States." It further provided for the surrender, on the request of the President, of fugitives found in Cuba or United States possessions. The act was to be applicable to Cuba only so long as the same should be "governed by United States authority."

Senator Hoar's bill applied to Cuba while that island should remain "under the authority of the United States." It enumerated the offenses for which extradition might be granted, and concluded with the following proviso:

> "That before making such order for surrender and return the Judge shall be satisfied that proper provision exists to secure to the defendant a fair trial for such offense before a civil judicial tribunal, where he will be represented by counsel; that the offense with which he is charged will be fairly and distinctly described to him, and that he will have an opportunity to be confronted at his trial with the witnesses against him."

On the 23d of May the bill (No. 11,719), in the form in which it had been reported by the House Committee on the Judiciary, was debated in the House of Representatives and passed.

Cong. Rec., p. 6365.

It was subsequently referred to the Senate Committee on the Judiciary.

Cong. Rec., p. 6402.

On the 28th of May that committee reported it back, with an amendment in the form of a substitute which confined its operation to the Island of Cuba. The substitute also incorporated the proviso (above quoted) from Senator Hoar's bill relative to a speedy and fair trial, &c.

Cong. Rec., pp. 6606, 6961, 6966-7, Senate Report No. 1515.

In its report the committee said (among other things):

> "There is no existing law under which a man may be arrested for an offense committed in the island of Cuba.
>
> There exists no extradition treaty between the United States and Cuba under which fugitives from justice may be detained and returned to the island for trial and punishment. * * * Our fiduciary relations to Cuba are of such a singular and exalted character that we should be quick to provide all necessary means for making effective laws which are operative in the island. It would indeed be idle for the military authority to provide or sanction a criminal code for the island if criminals could escape to the United States and no means be afforded for their apprehension and return to the proper jurisdiction, there to answer the charges standing against them. * * * We could not in good conscience, and with a just regard for the interests of the island within our control, and the interests of society, refrain from enacting a suitable statute of rendition and surrender.
>
> In order that there may be no vexatious exercise of the power of extradition under this act, it is provided that there shall be shown probable cause before a judge of the appropriate court who shall order the return and surrender, but no such order shall be made until the judge shall be satisfied that the accused will have a speedy and fair."

The amended bill, as thus reported, was further amended by the Senate by striking out the proviso relative to a fair and speedy trial (and in other but

less important respects), and, as thus amended, was passed by the Senate June 2d.

Cong. Rec., pp. 6722, 6955, 6961, 6970.

The House having failed to concur in the Senate amendments, and the Senate insisting upon its amendments, a Conference Committee was appointed.

Ibid., pp. 7172, 7188.

On the 5th of June the Conference Committee submitted a report recommending the passage of the bill in its present form. The report was agreed to by both Houses, and the measure, as enacted, was approved by the President the following day.

Ibid., pp. 7234, 7257, 7312, 7386, 7388.

The history of the bill in Congress and an examination of the debates in the Houses can leave no possible doubt that the act was passed for the express purpose of enabling the extradition of the appellant.

Ibid., pp. 6365-6372, 6961-6969.

V.

Of the appellant's arrest and the proceedings before the Circuit Judge

On the 13th of June, 1900, the Military Governor (who, as we have seen, had issued his requisition for the appellant's surrender nearly a month before), made a second requisition upon the President for his extradition, this time specifying the alleged embezzlement or "malversation of public funds" in violation of the Penal Code of Cuba, as the basis of his demand.

Record, p. 10.

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On the 27th of June two complaints were laid before the Circuit Judge, charging the appellant with the supposed offenses against the "laws in force in Cuba" specified in the two requisitions, and for which, as appears above, the appellant had been "indicted" in Havana.

Ibid., pp.

Both complaints are made "on information and belief," by Ernest E. Baldwin, as Assistant United States Attorney in and for the Southern District of New York, and in addition to the allegations setting forth the nature of the supposed offenses, they aver that the appellant "is a fugitive from justice * * * and is now within the territory of the United States of America, to wit, in the City of New York, in the Southern District of New York"; that the crime specified in each "is an offense within the meaning of the Act of June 6th, 1900"; that the island of Cuba is "a foreign country occupied by and under the control of the United States"; that the appellant had been theretofore declared to be "indicted," and that the Military Governor had issued his requisitions for the appellant's extradition, as above stated.

Petition, Exhibit A, pp. 8-9; Exhibit B, pp. 9-10.

At this time the appellant was in the custody of the appellee under an order of arrest issued in a civil action for conversion brought by the United States.

Petition, p. 7 (14).

Two separate warrants for the appellant's arrest, addressed "to the Marshal of the United States for the Southern District of New York, his deputies or either of them," were thereupon issued by the Circuit Judge. The language of the warrants is identical (except as to the recital of the offenses, in which respect they correspond to the complaints), and each commands the Marshal

"forthwith to take him, the said Charles F. W. Neely, and bring him before me, the said Judge, in order that the evidence of probable cause as to the guilt of the said Charles F. W. Neely of the offense charged against him may be heard and considered, and, if deemed sufficient, that the same may be certified, with a copy of all the proceedings, to the Secretary of State, that an order may issue for the return and surrender of the said Charles F. W. Neely pursuant to the authority of the said act of Congress."

Petition, Exhibit C. pp. 10-11; Exhibit D., pp. 11-12.

On the 29th day of June, the appellant having been taken into custody and brought before the Circuit Judge by the Marshal under the warrants, counsel for the appellant moved for a dismissal of the complaints, and for his discharge, upon various grounds, and among others:

First.—That the act of June 6, 1900, was unconstitutional and void, and conferred no jurisdiction upon the Circuit Judge; that there was no power in Congress, under the Constitution of the United States, authorizing the enactment of the measure; that the same was not a necessary or appropriate instrumentality for carrying into effect or executing any of the known powers of Congress; that the Act, if applicable to the defendant and to the situation set forth in the said complaints, would enable an American citizen to be subjected to the jurisdiction of a military government maintained by the President of the United States in friendly foreign territory in time of absolute peace; that no authority for such military government exists or can exist under the Constitution of the United States; and that the Act sought to aid the military branch of the United States Government in the maintenance and execution of an illegal and unwarranted usurpation of the sovereignty of the Cuban people.

Second.—That neither of the complaints charged the appellant with having committed an offense against any law in force in foreign

territory lawfully occupied by or under the control of the United States.

Petition, pp. 1–2.

The motion was denied* and a hearing ensued, which was continued by due adjournments to and including the 24th day of July. Evidence on the part both of the Government and the appellant was introduced. On the last mentioned day the case was submitted to the Circuit Judge for his decision.

Petition, p. 2.

The testimony is not to be found in the record, and it is immaterial. The evidence procured by the Military Governor to establish "probable cause" of the appellant's guilt, cannot affect the question of the jurisdiction of the Circuit Judge, whose sole authority for entertaining the extradition proceedings was the Act of June 6, 1900. If that act is unconstitutional it is not a law. It is, in legal contemplation, as inoperative as though it had never been passed, and the extradition proceedings must fall with it.

Norton *v.* Shelby County, 118 U. S., 442.

On the 8th of August the Circuit Judge handed down a written memorandum, wherein he stated that in his opinion the Government had shown probable cause to believe the appellant guilty of the offense of "embezzlement or criminal malversation of the public funds," he being a "public officer" or "employee" or "depositary"; that such an offense was obnoxious to the Penal Code of Cuba, and was a violation of the criminal laws there in force, and was also an offense defined in the Act of June 6, 1900, and that upon such evidence the appellant would be held for extradition.

Petition, p. 2; Exhibit E, pp. 12–15.

* The Circuit Judge filed a written opinion upholding the constitutionality of the Act, copies of which will be furnished the Court.

The memorandum concluded with this paragraph:

> "Two obstacles to his extradition now exist. He has been held to bail in this Court upon a criminal charge of bringing into this district government funds embezzled in another district. He has also been arrested in a civil action brought in this Court to recover $45,000, which, it is alleged, he has converted. When both of these proceedings shall have been discontinued, the order in extradition will be signed. This may be done on August 13th, at 11 A. M."
>
> *Ibid.*, p. 15.

VI.

Of the appellant's application for a writ of habeas corpus, its denial by the Circuit Court, and the appeal from the order denying the same.

Before any order in extradition had been signed, and before the other proceedings referred to by the Circuit Judge had been discontinued, and while the appellant was still in the custody of the appellee under the warrants in the extradition proceeding, to wit, on the 9th day of August, an application was made to the Circuit Court on his behalf for a writ of *habeas corpus*.

Petition, p. 7; Order, p. 17.

The petition, after setting forth the proceedings before the Circuit Judge, alleges that the appellant's arrest and detention in the extradition proceedings are without authority of law, and in violation of his rights, privileges and immunities under the Constitution and laws of the United States, the Act of June 6, 1900, being unconstitutional and void.

Ibid., p. 3.

The grounds upon which this contention is based are thus specified in the petition:

"1. That the people of the island of Cuba are and at all times since the month of April, 1898, have been free and independent, and that the said island is a foreign country, regarding whose government or affairs Congress cannot competently legislate, and in whose internal affairs the United States cannot lawfully interfere.

2. That by the joint resolution of Congress adopted April 19, 1898, and approved by the President the following day, the political branch of the Government of the United States found and determined as matter of fact that the Cubans had a government of their own, capable of performing the duties and discharging the functions of an independent nation, and having all the forms and attributes of nationality, entitling them to take and maintain a place in the great family of nations, and that such finding and determination of fact are absolutely binding and conclusive upon the judicial branch of the United States Government.

3. That the status of Cuba and of the people of Cuba as a free and independent nation has at all times since the adoption and approval of the said joint resolution remained, and yet does remain, unchanged.

4. That at the time of the adoption and approval of the said resolution a state of war existed between the people of the island of Cuba and the government of the Kingdom of Spain; various portions of the territory of the Cuban people were invaded by the Spanish forces, and certain parts thereof were occupied and controlled by such invading forces, and that by the adoption and approval of said joint resolution, and upon the adoption and approval of the same, the United States became the friendly ally of the Cuban people in its said war with Spain, and throughout the ensuing hostilities, and until the termination of the said war; the allied forces of the Cuban people and of the United States jointly waged war

against the government of the Kingdom of Spain.

5. That the said war had been wholly terminated and was at an end on or about the 1st day of January, 1899, at which time all the invading Spanish forces had evacuated the island of Cuba.

6. That at no time since the 1st day of January, 1899, has there existed a state of war between the Government of the United States and the Kingdom of Spain; that there has never existed a state of war between the United States and the Cuban people, but, on the contrary, the United States and the Cuban people have at all times during the existence of the latter as an independent nation been on terms of perfect peace and amity.

7. That during the latter part of said war and until peace was established, a part of the Army of the United States, consisting of several thousand officers and soldiers, was stationed in Cuba, and, in co-operation with the army of the Cuban people, conducted in the said island various military operations in the prosecution of the war and for its successful conclusion.

8. That on the 13th day of December, 1898, the Secretary of War of the United States made and issued an order wherein and whereby, by direction of the President, a division to be known as the Division of Cuba, consisting of the geographical department and provinces of the said island of Cuba, with headquarters in the city of Havana, was created under command of a major general of the United States Army, who, in addition to command of the United States troops in the said division, was by the said order directed to exercise the authority of military governor of the said island.

9. That when the said war was at an end and the island of Cuba pacified, and actual peace existed there, the said military forces of the United States being still stationed in Cuba, the President of the United States, as the Commander-in-Chief of the Army of the United States, instead of withdrawing the

army from the said island, and leaving the government and control thereof to the Cuban people, kept and continued the army and yet does keep and continue it there.

10. That thereupon the President, as such commander-in-chief, set up and established in the said island a military form of government, to wit, a government thereof by martial rule, and at all times since the said 1st day of January has there maintained, and yet does maintain, such military government in the island of Cuba and over the affairs of the Cuban people, thereby usurping and entirely suspending the government and control of the island by its people and substituting in its place martial rule.

11. That at all times since the said 1st day of January, 1899, the President of the United States has maintained such martial rule in Cuba, and throughout the territory of that island, through a military governor appointed by him, and by force of the army under his command.

12. That the said military governor assumes to exercise and has ever since the said 1st day of January, 1899, actually exercised absolute executive, legislative, and judicial power over the affairs of the island of Cuba and over the Cuban people and rules the same by his sole and uncontrolled will, subject to no superior authority save that of the President of the United States as Commander-in-chief of the United States Army.

13. That in the exercise of such martial rule the military governor has taken it into his hands and has subjected and now subjects to his absolute authority all the departments of government in that island. He assumes and actually exercises absolute power and authority, not only over the persons and property of the citizens of Cuba, but over the persons and property of all persons in the island there resident, or mere sojourners, and whether citizens of Cuba, or of the United States, or of any other nation, to the same extent and in the same manner as though Cuba were hostile foreign territory in the military occupation of

the United States in time of war and the United States were an invader or conqueror of territory belonging to an enemy nation, and were entitled to exercise the power of belligerent right. He assumes to enact, modify, amend, or repeal laws, establish, reorganize, or abolish courts, civil and criminal; adopt or change rules of judicial procedure, and in general to deal with the administration of justice in the island as he sees fit.

14. That on the said 1st day of January the said military governor published a proclamation addressed "To the people of Cuba," wherein and whereby he declared (among other things), that the civil and criminal code which prevailed in Cuba prior to the relinquishment of Spanish sovereignty would remain in force, with such modifications and changes as might from time to time be found necessary in the interest of good government.

15. That on the 11th day of January, 1899, he issued a military edict or order, whereby he ordered that thereafter the civil government of Cuba should be administered by four departments, to be known as the department of state and government, the department of finance, the department of justice and public instruction, and the department of agriculture, commerce, industries, and public works, each under the charge of a secretary; and on the following day he caused to be published an announcement of the appointment by him of secretaries of such departments.

16. That on the 14th day of April, 1899, he caused to be published a military order creating a supreme court, with jurisdiction throughout Cuban territory, composed of a president or chief justice, six associate justices, one fiscal, two assistant fiscals, one secretary or chief clerk, two deputy clerks, and other subordinate employees, with administrative functions, as well as those of a court of justice in civil and criminal matters.

17. That by article XXXVII of the same order he declared that to be eligible for appointment to the office of president, justice, fiscal, assistant fiscal, or deputy clerk of the

supreme court the person must (among other things) be a Cuban, or declare on oath that he accepts Cuban citizenship, provided he be a person included within the provisions of article 9 of the 'Treaty of Paris of December 10th, 1898.'

18. That on the 15th day of June, 1899, he issued a military edict or order whereby he declared that thereafter the '*audiencias*' of the island of Cuba should be organized and should excercise jurisdiction in accordance with the provisions of the said last-mentioned edict or order.

19. That by article XLI of the same order he declared article XXXVII (before mentioned) of the order creating the supreme court applicable to the functionaries of the '*audiencia*.'

20. That the supreme court, the '*audiencias*,' and certain tribunals called 'courts of first instance,' are at present the only courts in Cuba exercising or assuming criminal jurisdiction; that all of said courts are at present organized, controlled, and operated by the military governor, who assumes power to appoint, suspend, and remove their members, officers, and employees at his pleasure.

21. That said said courts act as the mere agents and instruments of the mililtary governor and are wholly dependent for their existence and continuance upon his will.

22. That under the military system now in force there is no means of trying offenders against the laws in force in Cuba (if any there be) except through the instrumentality of said courts or such other courts as the military governor may see fit to erect.

23. That there is no authority in the Constitution of the United States for the occupation or control by the United States of the territory of a friendly foreign nation, or for the government of such foreign territory by the United States by martial law, or otherwise, in time of peace, and that the form of government now maintained by the United States in Cuba is wholly illegal and without authority under the Constitution of the United States.

> **24.** That there is no authority in the Constitution of the United States for the exercise by the United States military authorities, through the President, as commander-in-chief, or otherwise, of jurisdiction over United States citizens who are civilians and not commissioned or enlisted in the military service, even in time of war, except in hostile territory in the forcible military occupation of the United States forces; and that in time of peace neither martial law nor military jurisdiction of any kind can lawfully be employed or exercised by the United States authorities as against civilian citizens even in the United States, much less in friendly foreign territory."
>
> Transcript of Record, pp. 3 6.

The petition alleges that the Act of June 6, 1900, is therefore unconstitutional and void in that —

> (*a.*) There is no authority in the Constitution for its enactment by Congress, the legislative power granted to Congress by the Constitution not extending to the enactment of any such measure.
>
> (*b.*) It seeks to aid the President of the United States, and the military governor appointed by him, in the maintenance in foreign territory, in time of peace, of an unlawful and unauthorized military jurisdiction.
>
> (*c.*) It seeks to give legal countenance and support to an unwarranted and unjustifiable invasion by the United States military forces of the territory of a friendly foreign power, and the wrongful usurpation of the functions of a sovereignty belonging to such foreign nation.
>
> (*d.*) It seeks to subject American citizens who are civilians and not in the military service to martial rule in time of peace.
>
> *Ibid.*, p. 6.

It is averred, in conclusion, that the act conferred no jurisdiction upon the Circuit Judge to entertain the extradition proceedings or to issue the warrants; that the warrants were issued without legal right,

authority or jurisdiction of any kind, and are utterly void and ineffectual, and that the appellant's arrest, detention and imprisonment thereunder are in violation of the Constitution of the United States, and of his rights, privileges and immunities thereunder.

Ibid., p. 7.

The application was denied (p. 17), and from the final order of the Circuit Court thereupon entered, an appeal to this Court was duly allowed (pp. 19-20), pending the determination of which the appellant has been remanded to the custody of the appellee (p. 18).

ERRORS ASSIGNED.

In denying the application the Circuit Court decided that it appeared from the petition itself that the appellant was not entitled to the writ.

U. S. Rev. Stat., Sec. 755.

In other words, the Court below held that, admitting the truth of all the allegations of the petition, the Act of June 6, 1900, was nevertheless a valid exercise of the legislative power of Congress, and that the appellant was lawfully detained in the proceedings instituted under it.

This decision was in effect a judicial determination that the President had authority under the Constitution to occupy and control the Island of Cuba, and to establish and maintain a military government in that island; that the present military government established and there maintained by the President is warranted and sanctioned by the Constitution, and, in short, that it was competent for Congress to enact the statute in question, and thereby to secure the reclamation from the United States of persons charged with criminal offenses in Cuba, in order to subject them to prosecution in the tribunals administering the judicial system there in vogue.

The following errors are specifically assigned:

"The court erred:

1. In denying the petitioner's application for a writ of *habeas corpus*.

2. In refusing to grant the said application.

3. In deciding that it appears from the petition itself that the relator is not entitled to such writ.

4. In holding that the petitioner is lawfully held in custody under the warrants of arrest issued under the act of Congress passed June 6, 1900, entitled 'An act amending section 5270 of the Revised Statutes of the United States.'

5. In holding that the enactment of said act of Congress was a valid exercise of the legislative power vested in Congress by the Constitution of the United States.

6. In holding that the United States or the President of the United States, or any officer, department, or branch of the United States Government, has authority under the Constitution of the United States to occupy or control the territory of a friendly foreign nation, or any part thereof, in time of peace, or to establish a military government therein, or to rule the same by martial law or otherwise.

7. In holding that the present government established by the President of the United States in the island of Cuba is warranted or sanctioned by the Constitution of the United States.

8. In holding that the President of the United States or the military authorities thereof, or any department of the United States Goverment, has authority under the Constitution of the United States to govern the island of Cuba or to interfere in any way or to any extent with the internal affairs of said island.

9. In holding that the President of the United States or the military authority thereof, or any other department of the United States Government, has authority under the Constitution of the Un ted States to establish or enforce the judicial system now in operation in the island of Cuba or any executive, legislative, or judicial authority therein.

10. In holding that the courts established by the military government of the island of Cuba and now in operation there have any legal existence.

11. In holding that the so called 'postal code' of the island of Cuba has any legal force or effect.

12. In holding that American citizens may, under the provisions of the Constitution of the United States, be lawfully extradited to Cuba for trial therein in the courts now existing in said island.

12. In holding that under the Constitution of the United States, Congress may subject a citizen of the United States, not enlisted or commissioned in the military service of the United States Government or subject to the articles of war and the rules and regulations of the United States Army, to martial law in time of peace.

14. In holding that Congress has power under the Constitution of the United States to authorize the extradition of an American civilian citizen in time of peace to a country occupied by the United States and governed by martial law by the President, as the Commander in chief of the United States, in order that such citizen may be there tried by a tribunal created by the United States military authorities.

15. In holding that under the Constitution of the United States the island of Cuba or any part thereof is now or has been at any time lawfully occupied by or under the control of the United States.

16. In holding that there is any right or power in the authorities at present in control of the island of Cuba to secure to any person a fair and impartial trial in Cuba within the spirit and meaning of the United States Constitution.

17. In holding that under existing conditions a person extradited to Cuba can there secure or be accorded a fair and impartial trial within the spirit and meaning of the United States Constitution.

18. In holding that there was evidence before the circuit judge in the proceedings which resulted in the petitioner's commit-

ment, establishing or tending to establish that he was or had ever been guilty of a violation of any criminal law in force in Cuba by the commission of one or more of the crimes specified in the said act of Congress."

Record, pp. 23–24.

BRIEF OF THE ARGUMENT.

FIRST.—The present case involves the construction and application of the Constitution of the United States within the meaning of Section 5 of the Act of March 3, 1891, and was properly brought here directly from the Circuit Court.

It is necessary to determine whether Congress has power under the Constitution to seize an individual in the United States and cause him to be sent to a foreign place where, in time of absolute peace, the President has set up and is maintaining a military government, which is administering (as the Military Governor has said, see *ante*, p. 65):

> "a system of laws with which Americans are entirely unfamiliar, and which would not be tolerated in any American community,"

in order that such individual may be there subjected to the jurisdiction of that government.

SECOND.—The fact that the appellant is detained by the appellee by virtue of process in a civil suit as well as under the warrants issued pursuant to the Act of June 6, 1900, does

not deprive him of the right to test the legality of his detention under the latter.

The appellant contends that he is illegally restrained of his liberty under the warrants issued in the extradition proceedings, and he asks to be released from custody only so far as he is held under those warrants.

If such restraint were removed he might, *non constat*, furnish a proper undertaking in the civil suit, and thus secure his release from confinement. In any event that confinement will eventually terminate at the same place where it began.

But there is no prospect or means of release in the extradition proceedings. The law contains no provision for bail. Unless the present appeal prevails, the appellant will be sent to Cuba, where he will be subjected to the jurisdiction of military tribunals, whose proceedings this Court has, perhaps, no power to review.

Matter of José Juan Vidal *et al.*, Nov. 12, 1900.

This Court has already had occasion to consider a similar situation, and although the question as to whether, where the petitioner is held under legal as well as illegal process he is entitled to obtain his release from the latter by *habeas corpus*, was apparently not raised, this Court did in fact order his discharge in so far as he was illegally detained, without regard to the other and legal detention.

In Coleman *v.* Tennessee, 97 U. S., 509, the plaintiff in error was held by the Sheriff of Knox County, Tennessee, upon a *capias* for the offense of murder, and *also* upon an indictment for assisting a prisoner in making his escape from jail. There was no claim made that he was not lawfully held upon the latter charge. The conviction for murder having been affirmed by the Supreme Court of the State, the United States Circuit Court on *habeas corpus* "being

of opinion that *so far as the defendant was held under the charge of murder*, he was held in contravention of the Constitution and laws of the United States, ordered his release from custody on that charge" (p. 512).

The Supreme Court of Tennessee having held that the order of the Circuit Court was a nullity, and refused to discharge the defendant as directed, the case was taken to this court by writ of error, where the judgment of the Supreme Court of Tennessee was "reversed, and the cause remanded with directions to discharge the defendant from custody by the Sheriff of Knox County *on the indictment and conviction for murder* in the State Court" (p. 519).

In the case at bar, the appellant contends that so far as he is held under the warrants issued under the Act of June 6, 1900, he is held in contravention of the Constitution and laws of the United States, and under the precedent of the case cited, this Court is asked to reverse the order of the Circuit Court, which denied his application for relief, and to direct his discharge from custody under those warrants.

THIRD.—The political status of the Island of Cuba at the time of the passage of the Act of June 6, 1900, was that of a free and independent power.

The status of Cuba at the time the act here under consideration was passed, and at the present time, is a question of material importance in this case. If the Island of Cuba was and is a "foreign territory occupied by or under the control of the United States," the act, provided it is a valid enactment, authorizes the appellants' surrender to the President's military representative in the Island in order that he may be there tried for alleged offenses

against the laws which it is claimed are there in force.

If, on the other hand, Cuba is not "foreign territory" but a place within the sovereignty and jurisdiction of the United States, then, of course, the act has no application to the present case, and the question as to whether or not it may be enforceable when foreign territory *is* in the possession of our military forces need not be considered.

(*a.*) The question, however, is one of fact, exclusively within the jurisdiction of the political branch of the Government, and not for this court, which by an unbroken line of authorities must accept as final and conclusive the determination arrived at by the political branch.

As long ago as Gelston *vs.* Hoyt, 3 Wheaton, 246-314, Judge Story said:

> "No determination is better established than that it belongs exclusively to governments to recognize new States in the revolutions that may occur in the world, but until such recognition either by our own Government or the government to which the new State belonged, courts of justice are bound to consider the ancient state of things as remaining unaltered."

(*b.*) By the terms of the Constitution, and by the uniform practice thereunder, the authority to recognize a new power is vested in the Executive, that is to say, in the President alone, or in the President and the Senate.

> See Senator Hale's Memorandum on the "Power to Recognize the Independence of a New Foreign State," 54th Congress, 2d Session, Senate Document No. 56.

Two points must be decided before the independence, or even the belligerency, of a foreign power is "recognized."

FIRST, whether the independence or belligerancy in fact exists; and

SECOND, whether it is advisable for the United States to take official notice of its existence.

A new nation may be, in fact, independent, yet its independence may not yet be recognized by the older nation from which it has separated itself. War may still be raging between them, and the recognition of the independence of the new nation may be regarded as a *casus belli* by the old one. National sympathy may be aroused in the United States to the extent of a willingness to go to war with the old nation for the sake of encouraging the new one. Such was the feeling of France toward the United States in the Revolutionary War, and of the United States toward Texas in 1837. National sympathy, on the other hand, may not be aroused with sufficient unanimity to justify the nation's agents, whether executive or legislative, to take such a step. The question may, therefore, be left to be decided partly by questions of expediency, and these questions are mainly diplomatic in methods of solution. It is the executive branch of the Government which is best qualified to judge whether recognition would be a *casus belli;* whether other neutral nations would join in it; whether it would jeopardize negotiations pending with the nation which would be expected to resent the recognition.

Ibid., p. 29.

These considerations, in themselves, show conclusively that the recognition of a foreign power belongs to the sphere of diplomacy, and, therefore, to the executive branch of the Government.

(c.) Congress has no power in the matter, further than to express to the Executive its sense of what political or diplomatic action will receive its support by way of subsequent legislation. Congress possesses purely legislative powers. It has no control

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over international law further than to enact that the rules of international law shall not be respected by the United States. Nor can it enact that something is a fact which is not a fact. It cannot make a foreign people independent, although it can enact that, for any specified purpose or purposes, it shall be regarded as independent by our executive department or by our Congress. Neither can Congress control international law, which is based upon the consensus of different nations. International law regards independence as a question of fact, and does not recognize it until it is a fact, irrespective of sympathy. Nor can the legislative branch of the Government hold any communications with foreign nations. The executive branch is the sole mouthpiece of the nation in communication with foreign sovereignties. Foreign nations communicate only through their respective executive departments. Resolutions of their legislative departments upon diplomatic matters have no status in international law. In the department of international law, therefore, properly speaking, a Congressional recognition of belligerency or independence would be a nullity.

All of these considerations were familiar to the statesmen who framed the Federal Constitution; and it is clear, from the terms of that instrument, that all findings of fact as to emergencies beyond the sea for purposes of international law and diplomacy were intended to be intrusted to the executive department exclusively.

Neither the legislative nor the executive branch of the Government is subordinate to the other. They are intended to be, and are, co-ordinate.

This is too familiar and elementary a doctrine of our constitutional law to require discussion here.

An examination, either of Congressional debates or of executive documents, from the beginning of the Government, will show the great care with which each of these departments has endeavored, with rare exceptions, not to infringe upon the province of the other, and in no instance is this more

clearly shown than in the debates upon the power to recognize a new foreign government, Congress on the one hand (except one House in 1864*) confining its action to proffers of advice or assistance, while the President, on the other hand, when any international complication from such recognition seemed probable, so that recognition would involve contingencies requiring legislation, would ascertain the wishes of the legislative branch of the Government.

(*d.*) Before taking action the Executive may properly consult the Legislature, especially when recognition will naturally require legislative action.

Whenever affirmative action of either the executive or the legislative branch of the Government may involve a call upon the assistance of the other, the branch about to take action should, if possible, first obtain indications of the other's desires, because it is of the highest importance that these two independent and co-ordinate branches of the Government should be always in accord. For this reason Monroe consulted Congress before recognizing the independence of the South American Republics in 1822, and Jackson similarly consulted Congress before recognizing the independence of Texas in 1837, exactly as President McKinley consulted Congress before recognizing the independence of the Cubans.

> "While the legislative branch of the Government cannot directly exercise the power of recognizing a foreign government, because that is a power executive or judicial in nature (and one which the judiciary, by refusing independently to examine the question, cast entirely upon the executive), nevertheless, if a recognition of such independence is liable to become a *casus belli* with some other foreign

* December 19, 1864, the House of Representatives passed a resolution declaring that "Congress has a constitutional right to an authoritative voice in declaring and prescribing the foreign policy of the United States, as well in the recognition of new powers as in other matters," &c. The Senate took no action in the matter.

power, it is most advisable, as well as proper, for the Executive first to consult the legislative branch as to its wishes, and postpone its own action if not assured of legislative approval."

Senator Hale's Memorandum, p. 2.

(*e.*) Recognition of a new State may be evidenced by any act fairly indicating an intention to recognize it.

16 Am. and Eng. Enc. L. (2nd Ed.), p. 1127.

"Recognition may be effected in very various ways. The most formal mode is by express declaration issued separately, and addressed to the new state, or by a like declaration included in a convention made with it. * * * But any act is sufficient which clearly indicates intention."

Hall's International Law, 4th Ed., Sec. 26, p. 92.

(*f.*) It will not be denied by any one that up to the time of the American intervention in the struggle between Spain and the Cuban insurgents, the Island of Cuba was one of the colonial possessions of the Spanish monarchy, and that at no time prior to that time had this Government disputed the complete sovereignty and dominion of Spain throughout that island.

(*g.*) It is now a part of the history of the world that from early in 1895 a civil war had prevailed in Cuba. The existence of this war, as a fact, was repeatedly recognized by Presidents Cleveland and McKinley, though neither party to it was formally recognized as a belligerent. The effect of the war from a legal and public standpoint is well known:

"A civil war breaks the bands of society and government, or at least suspends their force and effect; it produces in the nation two independent parties, who consider each other

as enemies, and acknowledge no common judge. Those two parties, therefore, must necessarily be considered as constituting, at least for a time, two separate bodies, two distinct societies."

Vattel, 425.

The parties to the war stand in precisely the same predicament as two nations who engage in a contest, and, being unable to come to an understanding, have recourse to arms.

Ibid.

"But it is not necessary to constitute war that both parties should be acknowledged as independent nations or sovereign states. A war may exist where one of the belligerents claim sovereign rights as against the other. Insurrection against a government may or may not culminate in an organized rebellion, but a civil war always begins by insurrection against the lawful authority of the government. A civil war is never solemnly declared; it becomes such by its accidents—the number, power and organization of the persons who originate and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory; have declared their independence; have cast off their allegiance; have organized armies; have commenced hostilities against their former sovereign, the world acknowledges them as belligerents and the contest a war."

Justice Grier in the Prize Cases, 67 U. S., 635, 666-667.

(*h.*) The executive department of our Government, long before intervention took place, had knowledge of the existence of the Cuban insurrection, and the fact that such an insurrection, constituting a civil war of unusual proportions, prevailed in that island, had been frequently made the subject of communications by the President to Congress.

On the 11th of April, 1898, after the series of events which we have already outlined, the Presi-

dent deemed it his duty to present the situation, which had then reached such an acute stage as to require executive action of some sort, to Congress, and to invite from that body expression of its wishes and desires in the matter.

In his message, the President advised against the recognition of Cuban independence.

After quoting from President Jackson's message of December 21, 1836, on the subject of the recognition of the independence of Texas, wherein he referred to the "long established policy of our Government" to defer recognition of the independence of a new government "until the lapse of time, or the course of events shall have proved beyond cavil or dispute the ability of the people of that country to maintain their separate sovereignty, and to uphold the government constituted by them," he continued:

> "These are the words of the resolute and patriotic Jackson. They are evidence that the United States, in addition to the test imposed by public law as the condition of the recognition of *independence* by a neutral State (to wit, that the revolted State shall 'constitute in fact a body politic, having a government in substance as well as in name, possessed of the elements of stability,' and forming *de facto*, 'if left to itself, a State among the nations reasonably capable of discharging the duties of a State'), has imposed for its own government in dealing with cases like these, the futher condition that recognition of independent statehood is not due to a revolted dependency until the danger of its being again subjugated by the parent State has entirely passed away."

Congress disagreed with the President as to the policy and propriety of recognizing the independence of the Cubans. It decided not only that the people of Cuba had a stable government, and possessed all the elements of sovereignty entitling them to take their place in the great family of na-

tions, but also that all danger of their being again subjugated by Spain had entirely passed away.

See Report of Senate Committee on Foreign Relations, 55th Congress, 2nd Sess., Senate Report No. 885.

The passage of the joint resolution and its prompt approval by the President followed.

(*i.*) The President thus receded from the position he had taken in his message of April 11th. The proceedings of Congress, and the facts as Congress viewed them, had apparently convinced him of the justice and right of the course which Congress advised.

He therefore promptly approved the resolution, and having thereby formally recorded his concurrence in the finding of the national legislature, he proceeded with earnestness and energy to enforce its requirements.

The approval of the resolution was followed by the President's demand upon the Spanish Government, and, upon its refusal to comply with that demand, by war measures on the part of the President, taken with the approval of Congress, consistent with the recitals of the resolution, and only justifiable by the facts therein declared to exist; and it is to be noted the resolution itself, and the declarations contained in it, were adopted as the justification and authority for every step thus taken by the President.

Message from the President, April 25, 1898, transmitting copies of correspondence, &c., showing the action taken under the joint resolution approved April 20, 1898. 55th Cong., 2d Sess., Senate Document No. 428.

(*j.*) If this action by the President, as the chief executive officer of the United States, upon its approval and in pursuance of the wishes of Congress

as expressed therein, constituted a recognition by the political branch of our Government of the independence of the Cuban people, this Court is precluded from any inquiry as to the truth of the fact thus recognized.

> "Who is the sovereign *de jure* or *de facto* of a territory is not a judicial but a political question, the determination of which by legislative and executive departments of any government conclusively binds the judges, as well as all other officers, citizens and subjects of that government."
>
> Jones *vs.* U. S., 137 U. S., 202.

There is absolutely no ambiguity in the wording of the resolution. Language could not be plainer. It is declared in explicit terms that the people of Cuba "are, and of right ought to be, free and independent," just as the representatives of the insurrectionary American colonies declared on the 4th of July, 1776, "That these United Colonies are, and of right ought to be free and independent States," &c. It further declared the purpose of the United States to aid the Cubans in maintaining their independence. It demanded that Spain withdraw from the Island, and the President was empowered to use the entire land and naval forces to secure this object.

What is independence in a nation or a people?

The term of course implies that it is equally sovereign and independent within its territorial limits, and owes no kind of subjection to any potentate on earth; and when used in the resolution it meant that the people of the Island of Cuba were as free from the Spanish yoke as they were free from the dominion of all other powers, including the United States.

It is quite immaterial that it did not in express terms recognize the existence of a Cuban "Republic" or "government" in some formal manner, or declare it to be a "state," "nation" or "power."

The resolution itself was but one step in the pro-

cess of recognition. Its approval by the President constituted another step, and his subsequent action formally completed the incident.

Mindful that the act of formally recognizing the independence of a new power was the function of the Executive, and not of the National Legislature, and so that there might be no suggestion of usurpation on its part, Congress, as we have seen, eliminated the phrase "and that the government of the United States hereby recognizes the Republic of Cuba as the true and lawful government of the Island" (see *ante*, pp. 30, 32), which had no place in the resolution, and transmitted the measure to the President as the expression of its views and desires upon the subject, and that he might know that Congress was prepared to pass such legislation as his approval of the resolution, or its consequences, might require.

(*k*.) It may be that simple recognition *per se*, that is to say, a naked declaration of the fact of independence, accomplishes nothing, and that some act on the part of the Executive indicating a positive intention to recognize the new power is necessary before it can be regarded as having any legal or political effect. In judicial procedure a finding of fact, in order to have the effect of an adjudication, must be followed by a judgment which has the effect of requiring some person or persons to do or refrain from doing some thing or things. So a simple declaration of fact by the executive department may perhaps be directly operative only so far as it is, in effect, an announcement that certain action will be taken by the Executive under its constitutional powers.

But when it is followed, as was the approval of the joint resolution, by deliberate executive action which unmistakably assumes the truth of the fact thus declared and demonstrates the intention of the Executive to do so, there can be no question but that the act of recognition is complete.

(*l.*) This recognition of the independence of the Cuban people not only established the fact of their independence, but constituted a further finding of fact by the political branch of our government, which is equally conclusive upon this Court, that at the time their independence was acknowledged the people of that island had an established government of their own, and possessed all the powers and attributes of sovereignity entitling them to take and maintain a place among the nations of the world.

New states generally come into existence by breaking off from an existing State. In such cases a third power

> "is not justified in giving such recognition until independence is actually established, or while a substantial struggle to subdue the new State is being made by the parent country, but recognition is proper when the efforts to recover authority are so inadequate as to offer no reasonable ground for supposing that success may ultimately be obtained."
>
> Am. & Eng. Enc. L., Vol. 16, 2nd Ed., pp. 1128–1129.

John Quincy Adams, Secretary of State, writing to President Monroe in 1816, pointed out admirably the considerations of law, of morals, and of expediency which are involved in recognition:

> "There is a stage in such (revolutionary) contests when the party struggling for independence has, as I conceive, a right to demand its acknowledgment by neutral parties, and when the acknowledgment may be granted without departure from the obligations of neutrality. It is the stage when the independence is established as a matter of fact so as to leave the chance of the opposite party to recover their dominion utterly desperate. The neutral nation must, of course, judge for itself when this period has arrived; and as the belligerent nation has the same right to judge for itself, it is very likely to judge differently from the neutral, and to make it a cause or pretext for war, as Great Britain did expressly

against France in our Revolution, and substantially against Holland. If war thus results, in point of fact, from the measure of recognizing a contested independence, the moral right or wrong of the war depends upon the justice and sincerity and prudence with which the recognizing nation took the step. * * * The fact and the right combined can alone authorize a neutral to acknowledge a new and disputed sovereignty."

Wharton's Dig. Int. Law, Sec. 70.

Without any previous recognition of the Cuban people as belligerents, the President declared their absolute freedom and independence.

Since this action would not have been permissible unless independence was actually established, it must be assumed that that condition did in fact exist. As independence implies an organized government and all the features of sovereignty, these must also be assumed to have existed.

The distinction between the recognition of the independence of a newly constituted government which separates itself from an old established nation, and the recognition of the existence of a civil war between such new government and the parent nation is obvious. In the latter case the very object of the contest is what the former determines to be already decided.

The action of our government in the case of Cuba was therefore a finding that the Cuban insurrection had succeeded, and that the Cuban people had effected, and were capable of maintaining the complete separation from Spanish sovereignty for which the insurrection was originated.

When, on March 8, 1822, President Monroe sent to Congress his celebrated message recommending the recognition of all the revolted colonies of Spain—Mexico, Colombia, Chile, and Buenos Ayres—Spain protested vigorously. The Spanish Minister in Washington urged that such action was an affront to morality and utterly inconsistent with the facts.

"Buenos Ayres," he said, was "sunk in the most complete anarchy;" in Peru, "near the

> gates of its capital," a rebel and a Spanish army divided the inhabitants; in Chile, "an individual suppresses the sentiments of its inhabitants;" "on the coast of Terra Firma, also, the Spanish banners wave;" "in Mexico, too, there is no government;" and he concluded, with force, "Where, then, are those governments which ought to be recognized?"

But Congress unanimously approved and adopted the President's views (as the President adopted and approved the views of Congress as expressed in the joint resolution of April 20, 1898), and,

> "although Mexico, Colombia, Chili and Buenos Ayres were in consequence admitted into the family of nations by the sole authority of the United States, with the approval of Congress, two years passed before the British Government consented even to discuss the subject in Parliament as a serious measure of policy."
>
> Report of Senator Cameron from the Committee on Foreign Relations, December 21, 1896, on "Recognition of Cuban Independence"; 54th Congress, 2d Session, Report No. 1160, pp. 13-15 *et seq.*

It will not be claimed that the recognition of the South American Republics was any the less a political finding of the fact of their independence, and of the further fact that they possessed organized governments of their own, because the existence of those facts was denied by the Spanish Minister. The fact was there conclusively established by the action of the Executive so as to prevent any judicial controversy on that point, precisely as the independence of Cuba, and the fact that at the time its independence was declared it had an established government, were conclusively determined when the President recognized those facts to exist.

The recognition of the independence or existence of a foreign state --

> " is well known to preclude any further inquiry by the judicial tribunals into the fact of their *due organization.*"
>
> Justice Woodbury in Scott *v.* Jones, 5 Howard, 374, citing Cherokee Nation *v.* Georgia, 5 Peters, 50, 59; United States *v.* Palmer, 3 Wheat., 634, and other cases.

(*m.*) The fact that the President did recognize, and intended to recognize, the fact of Cuban independence, precisely as that fact was declared in the joint resolution, is made evident by the language of the Treaty of Paris, which was drafted and negotiated by his own Commissioners, and throughout its entire length scrupulously followed the spirit, and, in some instances, almost the very words of the resolution. It does not follow that the treaty had such effect as was contemplated by the resolution. It may have constituted a political determination quite the reverse. Indeed, it may be argued that the terms of the treaty instead of recognizing Cuban independence very plainly deny it. If so, then it is clear that it at least fixes the status of Cuba, which, unless the joint resolution or some other political action on the part of the United States had that effect, remained Spanish territory until its conclusion and ratification. If it determined the fact otherwise than as we have argued, that determination may have a most important bearing on the case.

See pp. 173-174, *post.*

(*n.*) However, if the treaty was an assertion of the sovereignty of the United States in Cuba, *subsequent* legislation on the part of Congress and the President's approval of such legislation has destroyed its effect in that regard. We find that by the Act

of February 10, 1900 (*ante*, pp. 66-67) vessels owned by "citizens of Cuba" were accorded the rights and privileges of vessels of the "most favored nation," and the imposition of tonnage dues on Cuban vessels in excess of those prescribed by the Act of June 19, 1886, on vessels entering United States ports from any foreign port or place in * * * the West Indies was, by implication, declared illegal.

Surely, there could be no stronger evidence of a determination by Congress and the President that the ports of Cuba are foreign ports within the meaning of the international commerce and navigation laws.

(*o.*) The military administration of affairs in Cuba is not the act of the executive department, but of the President as commander-in-chief of the national forces. The assumption and exercise of such power and authority as he has seen fit to use in Cuba does not constitute in any sense a determination by the political branch of the Government as to the extent of the national domain and sovereignty.

The character of the administration and of the grounds upon which its legality will probably be asserted are considered at length in subsequent portions of this brief.

FOURTH.—Of the construction of the act of June 6, 1900, and the purpose and intent of Congress in its enactment.

> "In interpreting a law the motives which must have operated with the legislature in passing it are proper to be considered."
>
> *Ex parte* Milligan, 71 U. S., 2.

If any ambiguity exists it is proper to look to the "public history of the times."

Chief Justice Taney, in Eldridge *vs.* Williams, 3 How., 23-24.

The sole purpose of the act was obviously to provide a means of surrendering to the United States military authorities in Cuba, so long as the governmental affairs of that island should be administered by those authorities, persons there charged with the offenses specified in the act, in order that such persons might be tried in Cuba under the system there established and enforced by the military government.

This conclusion is the natural and inevitable result of the following considerations:

(*a.*) When the act was passed the Island of Cuba was foreign territory, if at that time there had been no political determination changing its status as fixed by the recognition of its independence.

When the word "foreign" is used in a Federal statute it means within the dominion of a foreign nation, *or* without the dominion of the United States.

> "The word 'foreign' means belonging to another nation or country; belonging to another jurisdiction."
>
> 13 Am. and Eng. Enc. L. (2d ed.), p. 830.

> "The primary and ordinary meaning of the term 'foreign,' is belonging to or relating to another sovereignty or dominion; as in the expressions 'foreign law,' 'foreign commerce,' 'foreign ministers,' '*foreign territory.*'"
>
> Brown, District Judge, in Bagley *v.* N. Y. and Porto Rico S. S. Co. (U. S. District Court, S. D., N. Y., Nov. 10, 1900). MSS. opinion, not yet reported.

"It is clear to my mind that a foreign port or place under the statute means a port or

> place exclusively within the sovereignty of a foreign nation. Such has been the uniform construction," &c.
>
> Story, *J.*, in *The Eliza*, 2 Gal., 4, 7.

In United States *v.* Hayward, *Ibid.*, 485, 500, the same distinguished jurist said:

> "By foreign ports, as the terms are here used, may be understood a port within the dominion of a foreign sovereign, and without the dominion of the United States."

See also

The Lark, 1 Gal., 55.
The Sally, Ibid., 58.
The Adventure, 1 Brock, 235.
Taber *vs.* United States, 1 Story, 1.
Loughborough *vs.* Blake, 5 Wheat., 317.

The term "foreign" is sometimes used in a more restricted sense in State legislation, as in such phrases as "foreign corporations," "foreign divorce," "foreign assignment," "foreign judgment," &c. But even then it retains its essential significance—namely, it refers to places without the jurisdiction of the particular State legislating.

A port or place in the hands of the enemy ceases to be domestic and becomes a foreign place for the time being, because it is no longer under the sovereignty of the United States.

United States *vs.* Hayward, 2 Gall., 500.
United States *vs.* Rice, 4 Wheat., 246.

It follows that if the Island of Cuba either (1) belonged to another power, or (2) was without the domain of the United States, it was "foreign territory" when the Act of June 9, 1900, was passed.

But the question has already been determined in the case of Betancourt *v.* Mutual Reserve Fund Life Association, where it was decided that a citizen of Cuba is a foreign citizen.

The action was upon an insurance policy and was brought in the Federal court by reason of diversity of citizenship. The Act of 1887 gives the Circuit Court jurisdiction of a controversy "between citizens of a State and *foreign States, citizens or subjects.*" The complaint averred that the defendant was a domestic corporation organized under and existing by virtue of the laws of the State of New York, and that having its principal office in the City of New York, and the plaintiff was a resident and inhabitant of the City of Matanzas, in the Island of Cuba, and a *subject and citizen of Cuba.* The demurrer asserted that the Court had no jurisdiction of the subject of the action. In overruling the demurrer, Judge Lacombe said:

> "The entire reliance of the demurrant appears to be upon the proposition that there is not the diversity of citizenship which the statute requires by reason of the fact that the plaintiff is a citizen of Cuba. Counsel does not maintain that plaintiff was not a foreign citizen before the breaking out of the war with Spain, nor that he ceased to be a foreign citizen when the joint resolution of April 20, 1898, was passed declaring that the people of the Island of Cuba 'are and of right ought to be free and indepeendent,' nor that the military occupation of Cuba by the forces of the United States in any way changed his *status.*
>
> It is contended, however, that in some way or other the treaty with Spain, of December 10, 1898, did, from the date of its ratification, remove him from the category of 'foreign citizens or subjects.' * * * There is certainly nothing in all this which lends any color to the proposition that the plaintiff is not a foreign citizen.
>
> Even the brief memorandum of opinion in Stuart *v.* City of Easton (156 U. S., 46) gives no support to demurrant's contention. One may be puzzled to determine upon what theory it was held in that case that a 'citizen of London, England,' is not a 'foreign citizen'; but assuming, as suggested, that it is because London is not a free and independent

community, but owes allegiance to the British crown, the decision has no application to the case at bar, since the political branch of this government has found as a political fact that the people of the island of Cuba 'are free and independent.'"

Betancourt *v.* Mutual Reserve Fund Life Assn., 101 Fed. Rep., 305.

(*b.*) At the time the act was passed the entire Island of Cuba was in fact occupied by and under the control of the United States.

(*c.*) It was and still is the only "foreign" territory occupied by or under the control of the United States.

The Hawaiian Islands had been formally annexed to the United States by the action of the executive and the national legislature.

Joint Resolution of July 7, 1898, 30 Stat., 750.

Porto Rico, the Philippines and the Island of Guam had been ceded to the United States by the Treaty of Paris, and were therefore a part of the national domain.

Cross *v.* Harrison, 16 How., 164.

Ex parte Ortiz, 100 Fed. Rep., 955.

Opinion of Brown, District Judge, in Bigley *v.* N. Y. & Porto Rico S. S. Co. (*supra*).

They were no longer foreign, since by the treaty the United States acquired title to their soil and dominion over them.

Goetz *v.* United States, 103 Fed. Rep., 72.

(*d.*) When the act was passed there was no treaty provision or Act of Congress under which persons charged with crime in Cuba could have been lawfully apprehended in the United States and sur-

rendered for trial in that island. There was therefore no authority for their extradition.

Holmes *v.* Jennison, 14 Peters, 540.
2 Op. Atty.-Gen., 452, 559 (Taney).
6 *Ibid.*, 85 (Cushing).
Dana's note (Dana's Wheaton), No. 73, pp. 182–184.
See also the reports of the House and Senate Committees on the Judiciary, *ante*, pp. 80, 83.

(*e.*) The alleged offenses of the appellant in Cuba, his "indictment" there, and the absence of any provision of law, by treaty, legislation or otherwise, authorizing his extradition, were the "known conditions" out of which the occasion for the adoption of the measure arose.

United States *v.* Trans-Missouri Freight Assn., 166 U. S., 290, 318.
Dunlap *v.* United States, 173 U. S., 65 75.

(*f.*) The legislative history of the act shows that it was passed for the express purpose of enabling the appellant's surrender.

Supra, pp. 77–84.

FIFTH.—If the political status of the Island of Cuba, as established by the recognition of Cuban independence, still continues, the institution and maintenance by the President of a military government in Cuba was and is without authority under international law, and in flagrant contra-

vention of the Constitution of the United States.

It has been judicially decided that the Treaty of Paris worked no change in the political status of Cuba.

> Betancourt *v.* Mutual Reserve Fund Life Ins. Assn. (*supra*), 101 Fed. Rep., 305.

In so holding Judge Lacombe said:

> "It is contended, however, that in some way or other the treaty with Spain, of December 10, 1898, did, from the date of its ratification, remove him from the category of 'foreign citizens or subjects.' By the first article of the treaty Spain relinquishes all claim of sovereignty over and title to Cuba, and as the island is, upon its evacuation by Spain, to be occupied by the United States, the United States will, so long as such occupation shall last, assume and discharge the obligations that may under international law result from the fact of its occupation, for the protection of life and property. The fourteenth article further states that it is understood that any obligations assumed in this treaty by the United States with respect to Cuba are limited to the time of its occupancy thereof. The ninth article provides for Spanish subjects, natives of the Peninsula, who remain in the territory covered by the treaty. If they make a certain declaration within a limited time they may preserve their allegiance to the crown of Spain, and in default of such declaration they are to be held to have renounced such allegiance, and to have adopted 'the nationality of the territory in which they may reside' There is certainly nothing in all this which lends any color to the proposition that the plaintiff is not a foreign citizen."

If, however, the treaty could have been construed as an assertion of American sovereignty in Cuba, the President and the national legislature have since

that time receded from that position by treating the Cubans as a "foreign nation."

See *ante*, pp. 66-67, 114-115.

Nevertheless, shortly after the treaty was signed the President appointed a military governor for the Island, who from the 1st day of January, 1899, to the present time, has governed it by what is, in effect, martial law, or at least what can be best described by that term. During this entire administration perfect peace has prevailed between the United States and Spain. The United States has always been on terms of peace and amity with the Cuban people, and, as is notorious, there has been no disorder there since the evacuation by the Spanish troops.

Congress has not authorized this action on the part of the President. It therefore depends for support entirely upon his power and authority under the Constitution as the Chief Executive of the nation.

I.

(*a.*) While the Government now enforced in Cuba is a "military" form of goverment, it is administering "martial," not "military" law, that is to say, it is the rule of a military dictator who assumes and discharges all governmental functions – executive, legislative and judicial.

Military law is the rule which governs the army alone. It cannot be applied to civilians not in the military service. Martial law is therefore the only rule which can be said to prevail when all the branches of government are administered by the military power.

We use the term in a broad sense for, of course, when there is no war the rules of war do not prevail; therefore, technically speaking, there can be no such thing as martial law in time of peace.

Military law exists in peace and in war. It is as fixed and definite in its provisions as any other branch of law, and is equally, with them, a part of the general law of the land.

But, in the words of Chancellor Kent, "martial law is quite a distinct thing." It exists, or at least can be properly exercised, *only in the time of war*, and originates in *military necessity*. It derives no authority from the civil law (using the term in its more general sense), nor does it require, though it often demands, assistance from the civil tribunals, for it may overrule, suspend or replace both.

It is, from its very nature, an arbitrary power, and extends to all the inhabitants (whether civil or military) of the district where it is in force.

> "It is the application of military government—the government of force—to persons and property within the scope of it, according to the laws and usages of war, to the exclusion of the municipal government, in all respects where the latter would impair the efficiency of military law or military action."
>
> Benet's Military Law and Courts-martial, 14.
>
> "It is one of the *incidents of war;* and, like the power to take human life in battle, *results directly and immediately from the fact that war legally exists.*"
>
> International Law and Laws of War, Halleck, 380.

Major O'Brien, in his Treatise on American Military Laws and the Practice of Courts-martial (p. 26), observes:

> "Many erroneous notions and much unfounded prejudice, in regard to military institutions, have arisen from confounding *military* with *martial* law. The popular opinion seems to be that these are but two names for the same code. Nothing can be further from the truth. Military law is a digested system of enactments, carefully made and deliberately confirmed by the supreme legislative authority of the commonwealth, and published for the observance of a body known to the Constitution, and created and sustained like any

other executive organ of the country. Martial law is something very different from this. As Blackstone very truly remarks, *it is, in fact, no law.* It is an *expedient* resorted to in times of *public danger, similar, in its effects, to the appointment of a dictator.* The General or other authority charged with the defense of a country, proclaims martial law. By so doing, he places himself above all law. *He abrogates or suspends, at his pleasure, the operation of the law of the land.* He resorts to all measures, however repugnant to ordinary law, which he deems best calculated to secure the safety of the State in the imminent peril to which it is exposed. Martial law, being thus vague and uncertain, and measured only by the danger to be guarded against, exists only in the breast of him who proclaims and executes it. It is contained in no written code. It bears, therefore, no analogy whatever to military law, and should ever be carefully distinguished from it. *Despotic in its character, and tyrannical in its application, it is only suited to those moments of extreme peril when the safety and even existence of a nation depend on the prompt adoption and unhesitating execution of measures of the most energetic character.* That such cases do arise, all history attests; and that popular governments are illy calculated to meet them, it would be vain to deny. At such periods, republics especially require some prompt mode of suddenly drawing out, and instantaneously applying, the whole energies of the people. From this principle of *self preservation*, the Constitution of the United States has wisely, and indeed necessarily, permitted the proclamation of martial law in certain specified cases of public danger *when no other alternative is left to preserve the State from foreign invasion or domestic insurrection.*"

See also

Blackstone, Vol. I., ch. 13, p. 413.
Kent's Com. (10th Ed.), Vol. I., p. 377.
De Hart, observations on Military Law, &c., p. 17.
Cowell's Law Dic.

Burrell's Law Dic., Vol. II., p. 708.
Clode, Military & Martial Law. p. 162.

Sir Charles Napier said:

> "The union of legislative, judicial and executive power in one person is the essence of martial law."
>
> *Ibid.*

This Court has said:

> "Martial law is the *law of military necessity* in the *actual presence of war*. It is administered by the general of the army and is in fact his will. Of a necessity it is arbitrary, but it must be obeyed.
>
> U. S. *vs.* Diekelman, 92 U. S., 520.

(*b.*) Since under the common law martial rule is only permissible as a war measure, in time of actual war, and then only in hostile territory, it is clear that there was never any authority for its exercise in Cuba, if our position regarding the status of that island is sound.

> "It is hardly necessary for us to add that, in our view of the case, martial law can never be enforced for the ordinary purposes of civil or even criminal justice, except in the latter, so far as the necessity arising from actual resistance compels its adoption."
>
> From the joint opinion of Sir John Campbell, Attorney-General, and Sir R. M. Rolfe, Solicitor-General (1838) as to the power of the Governor of Lower Canada to proclaim martial law. III. State Trials (new series), Appendix I, p. 1355.

The question in Dow *v.* Johnson, 100 U. S., 632, was, as Mr. Justice Field stated:

> "What is the law which governs an army *invading an enemy's country?*"

And, answering the question, that distinguished Judge continued:

> "It is not the civil law of the *invaded* country, it is not the civil law of the *conquering* country, it is military law, the *law of war*, and its supremacy for the protection of the officers and soldiers of the army, when in service in the field in the *enemy's country*, is as essential to the efficiency of the army as the supremacy of the civil law at home and in time of peace is essential to the preservation of liberty."

> "*It never was legal*, however to exercise martial law or the law of war *against the subject in time of peace*, or *against ordinary offenders for ordinary offenses*, and although at certain periods of our history it was found convenient to issue commissions of martial law for the punishment of such offenders and the repression of such mere riots or disturbances as could be repressed by the ordinary means and powers of law, *there never was any doubt that such commissions were wholly illegal.*"
>
> Finlason, Commentaries on Martial Law, p. 87.

(*c.*) It seems clear that the forcible intervention of the United States in the war between Spain and the Cuban people made the United States the friendly ally of the latter in a joint war against Spain.

This was the inevitable result, if, as a matter of fact, the people of the Island of Cuba were, as the President had found they were, free and independdent.

As the President well put it in his message of April 11, 1898:

> "In case of intervention our conduct would be subject to the approval or disapproval of such government. We would be required to submit to its direction, and to assume to it the mere relation of *friendly ally*."

But notwithstanding his former views on the subject, the President deemed it proper to approve the joint resolution, and, acting in accordance with its recommendations, to formally recognize the independence of the Cuban people. We thus became the "friendly ally" of Cuba, then at war with Spain, and thereafter our forces and those of Cuba waged a joint war against the Spaniards until hostilities ceased and the Treaty of Paris was concluded.

This proposition does not admit of serious discussion.

When war exists between the government *de jure* of a country and a government *de facto* of a seceding portion of the same country, other powers are entitled to remain indifferent spectators of the contest, and to allow impartially to both belligerents the free exercise of those rights which war gives to public enemies against each other; or they may espouse the cause of the party which they believe to have justice on its side.

Twiss, Law of Nations (2nd Ed.), Sec. 239.

Lawrence's Wheaton, 40, and notes.

> "In the first case, the foreign nation fulfills all its obligations under the laws of nations, and neither party has a right to complain, provided that it maintains an impartial neutrality; but in the latter case, the foreign state becomes the enemy of the party against whom it declares, and the ally of the other."
>
> Mr. Justice Clifford in Ford *vs.* Surget, 97 U. S., 594, 614, citing Wheaton.

This distinguished jurist said in the same case (97 U. S., p. 610):

> "It (a third party) may assist the government *de jure* as an independent power, or it may assist the insurgents, in either of which it becomes a party to the war; or it may remain impartial, still continuing to treat the govern-

ment *de jure* as an independent power, while it treats the insurgents as a community entitled to the rights of war against its adversary."

(*d.*) If the Island of Cuba was Spanish territory at the time of the American intervention the Cubans were our enemies.

The immediate and necessary consequence of war is to interdict all intercourse between the subjects of the belligerent States, and all persons residing in the hostile territory may be treated as enemies.

Hanger *v.* Abbott, 73 U. S., 535, 536.
The Prize cases, 67 U. S., 635, 674, 693.
Jecker *v.* Montgomery, 18 How., 110.
The Rapid, 8 Cranch, 155.
Brown *v.* Hiatts, 15 Wallace, 177, 184.
United States *v.* Pacific R. R., 120 U. S., 227, 233.
Mrs. Alexander's Cotton, 69 U. S., 404, 419.

That Cuba was not regarded as Spanish territory by the political branch of our government, but as the territory of a friendly foreign power, is made apparent by many circumstances, *e. g.*, the legislation of Congress providing for the furnishing of arms and subsistence supplies to the Cuban army, the action of the President in co-operating with the Cuban troops, &c.

(*e.*) Plainly, no nation can "occupy" or "control" the territory of a friendly power within the proper meaning of those terms.

"Occupation" of territory by a foreign army is its possession by force of military power to the exclusion of the sovereign. "Control" is practically the the same thing.

Foreign armies may be *stationed* in the territory of an ally or other friendly power, or may make it the base of military movements, but this is not occupation or control.

The latter only exists when, by force of arms, the actual possession of territory is wrested by an invader from its owner—in other words, when the territory is conquered.

It follows that the Island of Cuba as a whole was never hostile territory or "enemy ground." Our troops did not invade the island or any portion of it. Such portions of the island as were occupied by the Spanish forces may have been hostile territory until our forces, in conjunction with the Cuban army, forced them to surrender possession. Then, however, even such territory ceased to be hostile. The temporary dominion exercised by the Spanish invaders, having been wrested from them, was replaced by the sovereignty and authority of the Cuban people.

Under these circumstances there never has been any occasion, or any justification in public law, for the institution or maintenance in Cuba, by the President, temporarily or otherwise, of a military government of any kind.

II.

The Constitution of the United States confers no power upon the President to erect a military government in friendly foreign territory at any time, whether in time of war or peace.

It must be conceded that the President, as the Commander-in Chief of the Army and Navy may, by his military commanders, lawfully govern hostile territory, domestic or foreign, which he has invaded or conquered, in time of internal insurrection or of foreign war.

The decisions of this Court are uniform and controlling on this proposition, and it is quite unnecessary to cite them, or to discuss the principles or sound reasoning upon which they are based. These authorities, however, have no possible bearing upon the present case. It is one thing to govern enemy territory in the exercise of a recognized belligerent

right. The law of necessity requires that this should be done, for the preservation of the conqueror and the success of his arms. It is quite another to govern the territory of one's friendly ally, even though that ally be a weaker nation, and the greater power honestly believes that unless it assumes the burden of government the weaker one will be unable to successfully maintain its national character.

The question of the consent of the weaker nation is wholly immaterial to this case. There may be, and doubtless are, civilized nations whose form of government admit of this peculiar character of charity. An absolute monarch could, of course, assume to govern, as many foreign nations as chose to accept him as their ruler, and perhaps many constitutional monarchies could undertake the same responsibility.

(*a.*) With us, however, the question comes down to one of power. Has the President the power to govern the territory of a friendly foreign people in time of absolute peace? If, so, in what manner and by what authority has this tremendous power been conferred upon him?

> "The government of the United States is one of enumerated powers, the constitution being the instrument which specifies them, and in which authority should be found for the exercise of any power which the national government assumes to possess."
>
> Cooley, p. 9.

> "The government of the United States can claim no powers which are not granted by the constitution, and the powers actually granted must be such as are expressly given, or given by necessary implication."
>
> Chief Justice Marshall in Martin *v.* Hunter's Lessee, 1 Wheaton, 326.

The President can exercise no authority whatever but that which the constitution and laws give him. Beyond it he has no more power than any other citi-

zen. Our system knows no authority beyond or above the constitution and the laws. We may therefore dismiss the notion that the President has any prerogative as the representative of the people or as interpreter of the popular will. He is elected by the people to perform for them, and on their behalf, those functions, and those only, which are conferred upon him by the constitution and the laws made pursuant to it.

In Europe the executive is almost synonymous with the sovereign power of a state, and may include legislative and judicial authority.

In the United States the case is very different. Our government is founded upon compact. Sovereignty is in the people. It has been entrusted by them, so far as is necessary for the purposes of government, to the federal authorities by the Constitution. That instrument effectually separates the legislative, judicial and executive powers, which under our system are each a branch of the national sovereignty. The well being of the whole depends upon keeping each department within its limits. When either branch of the government usurps that part of the sovereignty which the Constitution assigns to another branch liberty ends and tyranny commences.

The decision in the English courts are not in point.

> "But in the distribution of political power between the great departments of government there is such a wide difference between the power conferred on the President of the United States and the authority and sovereignty which belong to the English crown that it would be altogether unsafe to reason from any supposed resemblance between them, either as regards conquest in war or any other subject where the rights and powers of the executive arm of the government are brought into question. Our own Constitution and form of government must be our only guide."
>
> Chief Justice Taney in Fleming *et al.* **v. Page, 9 Howard, 603, 618.**

(*b.*) That the President is exercising judicial and legislative power in Cuba cannot be denied. Through the Military Governor he has promulgated laws. He has established courts, prescribed their jurisdiction and their practice, and administers civil and criminal justice through their instrumentality.

Every trial involves the exercise of judicial power. From what source does the President or his military representatives derive judicial power? Certainly not from the Constitution, because that instrument expressly vests it "in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish," and it will not be pretended that the tribunals through which the Military Governor administers justice in Cuba are courts ordained and established by Congress.

It is clear, therefore, that his administration in Cuba involves the exercise of all the powers of government—executive, legislative and judicial. But by our Constitution these powers are carefully separated. Each is entrusted to a different department, and great care has been taken to prevent a usurpation by any branch of any of the powers bestowed upon the others.

Speaking of the theory of our government in this regard the immortal Washington said:

> "It is important, likewise, that the habits of thinking in a free country should inspire caution, in those entrusted with its administration, to confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another. The spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create, whatever the form of government, a real despotism. A just estimate of that love of power, and proneness to abuse it, which predominates in the human heart, is sufficient to satisfy us of the truth of this position. The necessity of reciprocal checks in this exercise of political power, by dividing and distributing into different depositories, and constituting each the

guardian of the public weal against invasions by the others, has been evinced by experiments ancient and modern; some of them in our country and under our own eyes. To preserve them must be as necessary as to institute them. If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for, though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield."

American Patriotism, p. 191.

(*c.*) The President of the United States possesses no power other than that given him by the Constitution and the laws of Congress; that is, there are no *inherent* powers in the Executive, no *reserved* authority, no implied prerogatives other than those which are necessarily dependent upon and derivable from the expressed constitutional provisions and the laws.

With the evils of a monarchy fresh in their memory the framers of the Constitution surrounded the President with such checks as to make him a mere *executive* officer. His powers were specifically defined and confined to the narrowest compass.

They are enumerated in Article II. of the Constitution, by which he is invested with the "executive power"; he is "commander-in-chief of the army and navy of the United States and of the militia of the several States when called into the active service of the United States"; and he is to "take care that the laws be faithfully executed."

(*d.*) The "executive power" is the executive power of the United States. It is not an unlimited power. It does not correspond to the powers which have

been or may be exercised by the executive of any other government.

Except the high honor of receiving embassies, as the representative of the government, he is stripped of all attributes of sovereignty; he is given no jurisdiction over the legislative or judicial branches, but on the contrary is made amenable to the former for his unofficial, as well as official, conduct; he can create no office, and his appointing power is only conditional; he is unable to declare war, or alone make treaties; his authority is mainly negative, confined chiefly to offering suggestions to Congress, granting pardons and reprieve, to concluding treaties and appointing ambassadors and other public officers "by and with the advice and consent of the Senate."

He cannot, in the absence of a treaty or act of Congress authorizing it, surrender up to justice a person charged with crime in a foreign place.

The injunction that he is to "take care that the laws be faithfully executed" means, that he is to use the methods furnished by law. The laws provide, not only what is to be done, but the manner of doing it, and this the President must observe.

> "It is perfectly plain and manifest that, although the framers of the Constitution meant to confer executive power on the President, yet they meant to define and limit that power, and to confer no more than they did thus define and limit. When the say it shall be vested in a President they mean that one magistrate, to be called a President, shall hold the executive authority; but they mean, further, that he shall hold this authority according to the grants and limitations of the Constitution itself."
>
> 4 Webster's Works, p. 186.

Manifestly there is nothing in the clause under consideration justifying the government now in Cuba.

(*e.*) There remains but a single clause to consider, and that is the one which makes him the commander-in-chief of the army and navy of the United States and the militia of the States when called into the federal service.

It seems almost absurd to suppose that the authority of the President as commander-in-chief carries with it the right to govern by martial law the territory of a foreign power with whom the United States are on terms of peace and amity, when, in the absence of a statute authorizing it, he was concededly without power to comply with the requisition of his own military subordinate, for the surrender of the appellant.

From the constitutional provision in question is adduced what is commonly called the "war power" of the President. But that power is in fact nothing more than the authority to command the armies and fleets which Congress causes to be raised. To command them is simply to direct their operations.

Federalist, No. 69.
Brown *v.* U. S., 8 Cranch, 126–145.
Dynes *v.* Hoover, 20 How., 81.
Wilson *v.* McKenzie. 7 Hill, 97.

It is for Congress to decide, in the first place, whether there shall be an army or navy, and the President must command the army or navy as it is created by Congress, and subject, as is every other officer of the army or navy, to such rules and regulations as Congress may from time to time establish.

It is for Congress to declare war, and until war is declared the President can exercise none of the powers of war.

There is no war in Cuba. The war was ended by the Treaty of Paris.

In time of peace the legislative and judicial branches of the Government are supreme in their respective spheres.

> "The President is the commander-in-chief of the army and navy, not only by force of the Constitution, but under and subject to the Constitution, and to every restriction therein contained, and to every law enacted by its authority, as completely and clearly as the private in the ranks. He is general-in-chief, but can a general in chief disobey any law of his own country? When he can he superadds to his rights as commander the powers of a usurper, and that is military despotism. * * * The mere authority to command an army is not an authority to disobey the laws of the country."
>
> "Executive Power," by Benjamin R. Curtis, Cambridge, Mass., 1862.*

The various provisions of Article I. of the Constitution conferring powers upon Congress show that the powers of the President do not include the power to raise or support an army, nor to provide or maintain a navy, nor to call both the militia to repel an invasion, nor to suppress an insurrection, nor to make laws for any place within the national jurisdiction.

If the President could not, even in flagrant war, except as authorized by Congress, call forth the militia of a State to repel an invasion of that State, it is absurd to say that he could in time of peace govern a foreign country by his military forces.

(*f.*) The establishment of a military government by the United States in Cuba after the war was ended and absolute peace prevailed cannot be defended as a war measure.

The war power has no existence except in time of war. The rights of war are against enemies; open

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* This work contains the following dedication by its distinguished author: "To all persons who have sworn to support the Constitution of the United states and to all citizens who value the principles of civil liberty which that Constitution embodies, and for the preservation of which it is our only security, these pages are respectfully dedicated by THE AUTHOR."

and armed enemies, while enemies and during war, but no longer.

Dissenting opinion of Mr. Justice Woodbury in Luther *v.* Borden, 7 Howard, 85, citing Vattel, B. 3, Ch. 8, Sec. 149.

"For if one has previously been in arms, but the insurrection or war is over, any belligerent rights cease, and no more justify a departure from the municipal laws than they do before insurrection or war begins. If any are non-combatants, either as never having been engaged in active resistance, or as having abandoned it, the rights of civil warfare over them would seem to have terminated, and the prosecution and punishment of their past misconduct belongs, then, to the municipal tribunals, and not to the sword and bayonet of the military."

Ibid, 86.

"With the cessation of hostilities the jurisdiction of the military tribunals to try and punish offenders belonging to or attached to the military establishment ceased. The military code of the United States seems to have been constructed without any consideration of the needs of an army in occupation of foreign territory in time of peace."

Special Report of Brig. Gen. Leonard Wood on Insular Affairs, as per instructions of Circular No. 10, War Department, March 25, 1899. 56th Congress, 1st Session, Doc. No. 2.

Even in time of war the Commander-in-Chief can employ only such measures as are necessary for the preservation of the army, or the safety of the nation. He has no right to use the national forces for any other purpose whatever.

The war power is limited to times of war, and the absolute necessities of military operations.

As this Court said in speaking of the appoint-

ment of a provisional governor for Texas, during the reconstruction period and "while the war yet smouldered" in that State:

> "Whether the action then taken was, in all respects, warranted by the Constitution, *it is not now necessary to determine*. The power exercised by the President was supposed, doubtless, to be derived from his constitutional functions as Commander-in-Chief; and, *so long as the war continued*, it cannot be denied that he might institute temporary government within *insurgent districts occupied by the national forces*, or take measures, in any State, for the restoration of State government faithful to the Union, employing, however, in such efforts only *such means and agents as were authorized by constitutional laws*."
>
> Chief Justice Chase in Texas *v.* White, 7 Wallace, 700, 729–730.

> "*In time of war* the President is not above the Constitution, but derives his power expressly under provision of that instrument, declaring that he shall be Commander-in-Chief of the Army. The Constitution does not specify the powers he may rightfully exercise in this character, nor are they defined by legislation. No one denies, however, that the President in this character is invested with very high powers, which it is well known have been called into exercise on various occasions during the present rebellion. * * * It is, perhaps, not easy to define what acts are properly within this designation, but they *must undoubtedly be limited to such as are necessary to the protection and preservation of the Government and the Constitution which the President has sworn to support and defend*" *Opinion* of Judge Leavitt in *ex parte* Vallandigham, Trial of Hon. Clement L. Vallandigham, published by Rickey & Carroll, 1863, p. 266.

(*g.*) The position of the Government makes the President the impersonation of the country, and claims for him the power and right to use all the

force he can command—not "to save the life of the nation," but to establish a government for another and independent people.

It has been suggested that if the President had not assumed this burden, that is, if upon the cessation of hostilities he had withdrawn our troops from Cuba, a state of anarchy would have prevailed in that island.

There are several answers to this suggestion. In the first place it was not for the President, as commander-in-chief, to dispute the truth of the political finding that the Cubans had an established government.

Again, there is no possible necessity justifying executive action except for the protection of American interests. This nation has no concern in the safety or welfare of another power except so far as its own interests are involved. The rules applicable to such cases will be considered hereafter.

In any event the doctrine sought to be advanced comes to a plea of "necessity." Our Constitution admits of no such plea

> "The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men at all times and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity upon which it is based is false; for the Government, within the Constitution, has all the powers granted to it which are necessary to preserve its existence, as has been happily proved by the result of the great effort to throw off its just authority."
>
> Davis, *J.*, in *Ex parte* Milligan, 71 U. S., 120–121.

As long as war lasted, it was undoubtedly competent for the President, in the conduct thereof, to

institute such war measures, in conjunction with our Cuban allies, as were dictated by the existing necessity; but when the necessity ceased so also did the power. Just as soon as the allied forces of the United States and Cuba succeeded in expelling the Spanish troops from the territory of the Cubans, and in thus vindicating the acknowledged independence of the latter, nothing remained but for this country to leave them to its enjoyment. The relations between the United States and Cuba remained, as they have been throughout, entirely friendly. There was no war or pretense of war, and hence no possible justification for the employment of the war power.

III.

(*h.*) In the well known case of *Ex parte* Milligan, 71 U. S., 2, it was held that in a State where the federal authority was unopposed no usage could sanction a military trial for any offense whatever of a citizen in civil life, in no wise connected with the military service, notwithstanding a state of war existed between the federal government and the rebel states, and that military departments were established in the loyal States. Davis *J.*, delivering the prevailing opinion, said:

> "*Congress could grant no such power*, and
> "to the honor of our national legislature, it
> "has never been provoked by the state of the
> "country even to attempt its exercise."

Four judges dissented, believing that the privilege of the right of *habeas corpus* being necessarily suspended, trial and punishment by military commissions might have been authorized by Congress had it chosen to do so, even where the civil courts remained open. While the dissent is quite unimportant here (for we have nothing except a state of absolute and undisturbed peace), the opinion of the minority of the Court strongly confirm the soundness

of our position in the present case. We shall quote some of its language:

> " But we do not put our opinion, that Congress might authorize such a military commission as was held in Indiana, upon the power to provide for the government of the national forces.
>
> Congress has the power not only to raise and support and govern armies, but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to *all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as Commander-in-Chief.* Both these powers are derived from the Constitution, but neither is defined by that instrument. Their extent must be determined by their nature, and by the principles of our institutions.
>
> The power to make the necessary laws is in Congress; the power to execute in the President. Both powers imply many subordinate and auxiliary powers. Each includes all authorities essential to its due exercise. But neither can the President, in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President. Both are servants of the people, whose will is expressed in the fundamental law. Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offenses, either of soldiers or civilians, unless in case of a controlling necessity, which justifies what it compels, or at least, insures acts of indemnity from the justice of the Legislature.
>
> *We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists.*
>
> *Where peace exists the laws of peace must prevail.* What we do maintain is, that *when the nation is involved in war* and some portions of the country are invaded and all are

exposed to invasion it is within the power of Congress to determine to what States or districts such great and imminent public danger exists as justifies the authorization of military tribunals for *the trial of crimes and offenses against the discipline or security of the army against the public safety.*

In Indiana, for example, at the time of the arrest of Milligan and his co conspirators, it is established by the papers in the record that the State was a military district, was the theatre of military operations, had been actually invaded and was constantly threatened with invasion. It appears, also, that a powerful secret association, composed of citizens and others, existed within the State, under military organization, conspiring against the draft, and plotting insurrection, the liberation of the prisoners of war at various depots, the seizure of the State and National arsenals, armed co-operation with the enemy and war against the National Government.

We cannot doubt that, in such a *time of public danger*, Congress had power, under the Constitution, to provide for the organization of a military commission, and for trial by that commission of persons engaged in this conspiracy. * * *

It was for Congress to determine the question of expediency. And Congress did determine it. That body did not see fit to authorize trials by military commission in Indiana, but by the strongest implication prohibited them. With that prohibition we are satisfied, and should have remained silent if the answer to the question certified had been put on that ground, without denial of the existence of a power which we believe to be constitutional and important to the public safety —a denial which, as we have already suggested, seems to draw in question the power of Congress to protect from prosecution the members of military commissions who acted in obedience to their superior officers, and whose action, whether warranted by law or not, was approved by that upright and patriotic President under whose administration the Republic was rescued from threatened destruction.

We have thus far said little of martial law, nor do we propose to say much. What we have already said sufficiently indicates our opinion that *there is no law for the government of the citizens, the Armies or the Navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution. And wherever our Army or Navy may go beyond our territorial limits, neither can go beyond the authority of the President or the legislation of Congress.*

There are under the Constitution *three kinds of military jurisdiction:* One to be exercised both in peace and war; *another to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion and civil war within States or districts occupied by rebels treated as belligerents*; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of States maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under military law, and is found in Acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; *the second may be distinguished as military government, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander, under the direction of the President, with the express or implied sanction of Congress*; while the third may be denominated martial law proper, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril, by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights.

We think that the power of Congress, *in such times and in such localities*, to authorize trials for crimes against the security and safety of the national forces, may be derived from its constitutional authority to raise and support armies and to declare war, if not from its constitutional authority to provide for governing the national forces."

IV.

The executive department has invented and bestowed upon the military system in Cuba novel appellations. It calls it a "holding in trust for the inhabitants" (President's Message, Dec. 5, 1899); "the control now held by us in trust for the people of Cuba" (Report of Secretary of War for 1899, Vol. I., p. 16), &c.

Where is the authority for the "holding in trust" by the President of territory which does not belong to the United States?

The powers of government are indeed a trust, but they can only be lawfully exercised for the good of the American people—not for the benefit of the inhabitants of any foreign place.

It is true that when the President acquires foreign territory, he holds it in trust. But the people of the United States are the beneficiaries of the trust, and he holds or relinquishes possession as they shall determine.

At the last term of this Court, Mr. Justice Shiras, delivering the opinion in Morris *v.* The United States (174 U. S., 196, 237), and quoting from Shively *v.* Bowlby (152 U. S., 57), said, referring to the cession by the State of Maryland of the Federal territory in the District of Columbia:

> "Upon the acquisition of a Territory by the United States, whether by cession from one of the States, or by a treaty with a foreign country, or by discovery and settlement, the same title and dominion passed to the United States for the *benefit of the whole people* and in trust *for the several States to be ultimately created out of the territory.*"

V.

If we are correct in our position, the President has been guilty of a plain violation of the laws of the United States in making such a use of the army of the United States in the island of Cuba, as the

facts show he has, without the authority of Congress.

Upon the conclusion of the treaty of peace the President ceased to have power to use the army in Cuba for any purpose; and it cannot be pretended that the President in his executive capacity as chief magistrate can consistently with the Constitution and laws of the United States employ the army for any purpose not plainly authorized thereby.

By Section 15 of Chapter 263 of an Act of Congress passed June 18, 1878, it is provided as follows:

> "From and after the passage of this act it shall not be lawful to employ any part of the army of the United States, as a *posse comitatus* or otherwise, for the purpose of executing the laws, except in such cases, and under such circumstances, as such employment of said force may be expressly authorized by the Constitution or by act of Congress."

VI.

The Treaty of Paris furnishes no justification for the military occupation of Cuba by the United States. Our Government could not derive from the treaty any right or power not conferred by the Constitution. As long ago as the case of Pollard's Lessees *vs.* Hagan, it was there held that under the Florida treaty the United States did not succeed to those rights which the King of Spain had held by virtue of his royal prerogative, but possessed the territory subject to the provisions of the United States Constitution. The Court said:

> "It cannot be admitted that the King of Spain could by treaty or otherwise impart to the United States any of his royal prerogatives, and much less can it be admitted that they have capacity to receive or power to exercise them. Every nation acquiring territory by treaty or otherwise must hold it subject to the constitution and laws of its own

> government and not according to those of the government ceding it."
>
> 3 How., 212, 225.

In the License Cases, it was said:

> "Laws of the United States in order to be binding must be within the legitimate powers vested by the Constitution. Treaties to be valid must be within the scope of the same powers, for there can be no 'authority of the United States,' save what is derived mediately or immediately and regularly and legitimately from the Constitution."
>
> 5 How., 504, 613.

Again:

> "The Government of the United States * * * is one of limited powers. It can exercise authority over no subject except those which have been delegated to it. Congress cannot by legislation enlarge the federal jurisdiction, nor can it be enlarged by the treaty-making power" McLean, *J.*, in the Mayor, &c., of New Orleans *vs.* United States, 10 Peters, 662, 736.

Furthermore, aside from the limitations imposed by our Constitution, the result would necessarily be the same. Spain could not part with any rights in Cuba, because she had none. Her sovereignty there had already been completely wiped out.

VII.

There are occasions when it is permisible for one nation to invade the territory of another, *e. g.*, when the lives and property of its citizens are endangered, or perhaps, when such course is imperative from motives of self-protection.

But no such condition justifies the erection of a military governor in such invaded territory whereby

the affairs of its inhabitants are to be administered by the commander of the invading forces.

Nor have the principle of international laws which permits such invasion any application to the present situation of affairs in Cuba.

Our army never entered Cuba with any hostile intent, or to repel any assault upon our sovereignty. They were not sent there to protect American interests, or to serve any purpose except to aid our Cuban allies in the expulsion of the Spanish forces—the common enemy.

SIXTH.--Entirely apart from the question of the status of Cuba, the act of June 6, 1900, is unconstitutional and void because it seeks to deprive the appellant of the rights, privileges and immunities guaranteed to all persons accused of crime in every place within the sovereign power and dominion of the United States.

Our Constitution contains many provisions which in their very nature, or by their very terms, circumscribe and limit the executive, legislative and judicial departments in the exercise of their respective powers at all times and in all places.

Such are the provisions as to the suspension of the writ of *habeas corpus*, as to bills of attainder and *ex post facto* law, and others in Art. I., § 9, the provision for trial by jury in § 3 of Art. II., the Bill of Rights embodied in the first ten amendments and the thirteenth, in part the fourteenth and the fifteenth amendments.

We quote the fundamental rights, privileges and immunities which the Constitution guarantees to

persons accused of crime within the national jurisdiction:

> "The trial of all crimes, except in cases of impeachment, shall be by jury, and such trial shall be held in the State where the said crime shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed."
>
> Const., Art. III., § 2, subd. 3.

> "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land and naval forces," &c.; nor shall any person "be deprived of life, liberty or property without due process of law."
>
> VIth Amendment.

> "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district where the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."
>
> VIIth Amendment.

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."
>
> VIIIth Amendment.

I.

Surely there can be no question of the restrictive effect of these prohibitions and limitations upon all the branches of the government.

Neither the executive, legislative or judicial departments can, under the Constitution, exercise power over the person or property of any one beyond

what the Constitution confers, nor lawfully deny any one of any right which it has guaranteed.

Our institutions of government

> "do not mean to leave room for the play and action of purely personal and arbitrary power."
>
> Matthews, *J.*, in Yick Wo *v.* Hopkins, 118 U. S., 370.

Its theory

> "is opposed to the deposit of unlimited power anywhere."
>
> Miller, *J.*, in Loan Assn. *v.* Topeka, 20 Wall., 663.

It follows that the President is forbidden to exercise the executive function precisely as Congress may not legislate, or the courts expound the law, in such a manner as to violate any of the constitutional provisions.

The Constitution provides that—

> "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States," &c.
>
> Article IV., § 3, Sub. 2.

This power is not, however, an arbitrary or unrestricted one, but it is subject to all the limitations of the Constitution respecting *habeas corpus*, trial by jury and the like.

> Reynolds *v.* United States, 98 U. S., 145.
> Callan *v.* Wilson, 127 U. S., 540.
> Springville *v.* Thomas, 166 U. S., 707.
> Baumann *v.* Ross, 167 U. S., 548.
> Thompson *v.* Utah, 170 U. S., 343.
> Capital Traction Co. *v.* Hof, 174 U. S., 1.
> Block *v.* Jackson, 177 U. S., 363.

In Callan *v.* Wilson, 127 U. S., 540 (1887), the appellant had been tried and convicted of conspiracy in

the Police Court of the District of Columbia, without a jury pursuant to the act of Congress (Rev. Stat., Dist. Col., § 1046). In reversing the conviction upon the ground that the statute was unconstitutional and void, the Court said, per Harlan, *J.*:

> "As the guarantee of a trial by jury in the Third Article, implied a trial in that mode and according to the settled rules of the common law, the enumeration in the Sixth Amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the States to have in the supreme law of the land, and *so far as the agencies of general government were concerned*, a full and distinct recognition of those rules, as involving the fundamental rights of life, liberty and property."

In Springville *v.* Thomas, 166 U. S., 707 (1896), the Supreme Court of the Territory of Utah, had, in upholding an act of the territorial Legislature providing that a verdict in a civil case should be valid, if concurred in by nine jurors, construed the Act of Congress establishing the Territory as having

> "vested in the territorial Legislature such unlimited legislative power as enabled it to provide that unanimity * * * was not necessary to a valid verdict."

The question before this Court was whether the Act of Congress, as thus construed, was constitutional. In holding that it was not, Chief Justice Fuller, delivering the unanimous opinion of the Court, said:

> "In our opinion the Seventh Amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common law cases; and the Act of Congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so."

II.

When the President assumed the right to govern the Island of Cuba, all the laws then in force in that Island in any manner repugnant to our Constitution were, by the settled principles of international law, immediately displaced.

> "As a matter of course all laws, ordinances and regulations in conflict with the political character, institutions and Constitution of the new government are at once displaced."
>
> Field, *J.*, in Chicago, &c., Ry. Co. *v.* McGlinn, 114 U. S., 542–546.

> "And in case the government of the new state is a constitutional government, of limited and divided power, questions necessarily arise respecting the authority, which in the absence of legislative action, can be exercised in the conquered territory after the cessation of war, and the conclusion of a treaty of peace. The determination of these questions depends upon the institutions and laws of the new sovereign, which, though conformable to the general rule of the law of nations, affect the construction and application of that rule to particular cases."
>
> Halleck, Int. L., Ch. XXXIII., § 14.

As Mr. Marcy said of the military government, in California, in 1848:

> "But the government *de facto* can, of course, exercise no powers inconsistent with the provisions of the Constitution of the United States, which is the supreme law of the land for all the states and territories of our Union."
>
> Cross *v.* Harrison, 16 How., 164.

III.

But the President, in the administration of Cuban affairs, has not only failed to treat the Spanish sys-

tem as displaced, but applies its methods in judicial proceedings.

He has assumed to deny the right of indictment by a grand jury. He has undertaken to try offenders without a jury. He will not allow the remedy of *habeas corpus*. Upon the trial of accused persons he permits the judges to act upon the presumption of guilt instead of that of innocence. He suffers convictions to be had where the accused has never been confronted with the witnesses against him.

We need not further specify the way in which the Cuban judicial system violates our Constitution.

IV.

Our history furnishes no precedent for the methods the President is pursuing in Cuba.

(*a*.) Louisiana, although ceded by France, brought with it the Spanish law, in force since 1769. The successive acquisition of Florida, California and New Mexico found us in possession of territory in which also existed the Spanish system than which there is none more repugnant to the principles of our law.

In none of these instances was the Spanish system permitted to prevail for a moment after we assumed sovereignty and dominion.

Louisiana was ceded by a treaty bearing date April 30, 1803, but the possession of it by the United States depended upon the terms of final ratification by the parties to it, and upon the delivery of it, first from Spain to France and then from France to the United States.

The surrender from Spain to France was formally made on November 30, 1803, and that to the United States twenty days later.

Immediately upon this the constitution and laws of the United States were regarded as in force, and from that time until the organization by Congress of a territorial form of government the following year, the provisional governor in the administration of

the judicial system of the ceded territory observed and enforced all the rights, privileges and immunities guaranteed by our constitution.

For a considerable period after it had passed under the dominion of the United States, while a judicial system strangely combining English case law, French code law and Spanish usages, were enforced, the constitutional safeguards were always observed and enforced.

The Act of Congress (March 19, 1804), creating a territorial government for this territory, declared that the inhabitants should be entitled to the ordinary rights guaranteed by our Constitution, *e. g.*, the writ of *habeas corpus*, trial by jury, bail except in certain capital cases, and immunity from cruel and unusual punishments. With these modifications it left the Spanish criminal law to be deal with by the territorial government, which wholly abolished it, while retaining the civil code, and substituted for it an act defining crimes and misdemeanors, providing for the right of inspecting indictments, examining jurors, consulting with counsel, public trial and sentence, &c. It concluded as follows:

> "All the crimes, offenses and misdemeanors hereinbefore named shall be taken, intended and construed according to and in conformity with the common law of England, and that the forms of indictment (divested of unnecessary prolixity), the method of trial, the rules of evidence, and the prosecution of said crimes, offenses and misdemeanors, charging what ought to be charged, shall be, except as is by this act otherwise provided for, according to said common law."
>
> Acts Leg. Council, Orleans Terr., 1st Sess., Ch. L., Sec. 33.

(*b.*) The Act of Congress for the administration of Florida (March 30, 1822) followed the Louisiana precedent. The Legislative council by a single enact-

ment abolished all Spanish law in force and replaced it by the common law of England.

Leg. Council of Florida, 1st Sess., Act. of Sept. 2, 1822.

A further act defined crimes, and provided for their punishment according to the principles of our system.

Ibid.

(c.) When we were at war with Mexico, and in military occupation of its territory, Brig.-Gen. S. W. Kearny, commanding at Santa Fé, New Mexico, put in force by military order (Sept. 22, 1846) a code of law still known by his name, that superseded the existing criminal code.

"The Kearny Code," printed in Compiled Laws, New Mex., 1897.

Simultaneously with the order establishing the Code, Gen. Kearney promulgated a "Bill of Rights" as follows:

> "That the great and essential principles of liberty and free government may be recognized and established, it is hereby declared:
>
> FIRST.—That all political power is vested in and belongs to the people.
>
> * * * * * *
>
> FIFTH.—The right of trial by jury shall remain inviolate.
>
> SIXTH.—In all criminal cases the accused bas the right to be heard by himself and counsel, to demand the nature and cause of the accusations, to have compulsory process for witnesses in his favor, to meet the witnesses against him face to face, and to have a speedy trial by jury of his county.
>
> SEVENTH.—The accused cannot be compelled to give evidence against himself, or be deprived of liberty or property, but by a verdict of a jury and the laws of the land."
>
> *Ibid.*

The Kearny Code carefully preserved the right of indictment and jury trial, *habeas corpus*, &c.

Six articles were devoted to "*Habeas Corpus*," eleven to "Jurors."

The article entitled "Practice of Law in Criminal Cases" (§§ 10-13) provided for indictment by Grand Juries and a jury system under our Constitution.

Section I. of the article entitled "Laws" was as follows:

> "All laws heretofore in force in this Territory *which are not repugnant to or inconsistent with the Constitution of the United States* and the laws thereof, or the statute laws in force for the time being, shall be the rule of action and decision in this territory."

> "These laws," said General Kearny in a letter to the Adjutant-General, "are taken part from the laws of Mexico—retained as in the original—a part, *with such modifications as our laws and Constitution made necessary;* a part are from the laws of Missouri territory, a part from the laws of Texas, and also of Texas and Coahuila, a part from the statutes of Missouri, and the remainder from the Livingston Code."
>
> *Ibid.*

President Polk, speaking of the Kearny Code, said:

> "It will be apparent from the reports of the officers who have been required by the success which has crowned their arms to exercise the powers of temporary government over the conquered territories, that if any excess of power has been exercised, the departure has been the offspring of a patriotic desire to give to the inhabitants the privileges and immunities so cherished by the people of our own country, and which they believed calculated to improve their condition and promote their property."
>
> President Polk's message of December 22, 1846.

The organic act establishing the territory of New Mexico was approved September 30, 1850. Meantime the Kearny Code was enforced by the *de facto* government.

V.

In *ex parte* Milligan (*supra*), 71 U. S., 2, this court decided that neither the President, nor Congress, nor the judiciary could disturb any one of the safeguards of civil liberty incorporated into the Constitution, except so far as the right is given to suspend the privilege of *habeas corpus* in certain cases. It was further decided in that case, as we have seen, that in time of war a civilian citizen cannot, in a place which is not the actual theatre of war (even though the privilege of the writ of *habeas corpus* has been suspended at that place), be tried by a military tribunal.

At the time Milligan, who was a citizen of Indiana, was tried and convicted "an armed rebellion against the national authority, of greater proportions than history affords an example of, was raging."

71 U. S., 115.

Although Indiana was a loyal State it was at that time comprised in one of the military departments established by the President.

It bordered, however, upon the territory occupied by the insurgents, and was itself at times greatly disturbed by the neighboring hostilities. Milligan was arrested at his home by the military power of the United States on a charge of treason, imprisoned, tried, convicted and sentenced to be hanged, by a military commission organized under the direction of the military commander of the military district of Indiana.

The question before this Court was:

> "Had this tribunal the legal power and authority to try and punish this man?"
>
> *Ibid.*, p. 118.

"No graver question was ever considered by this Court," said Mr. Justice Davis, who delivered the opinion, "for it is the birthright of every American citizen when charged with crime, to be tried and punished according to law."

Ibid., p. 119.

In holding that the military commission was without jurisdiction to try Milligan, and that his detention under its authority was utterly illegal and void, Mr. Justice Davis said:

"If there was law to justify this military trial, it is not our province to interfere; if there was not, it is our duty to declare the nullity of the whole proceedings. The decision of this question does not depend on argument or judicial precedents, numerous and highly illustrative as they are. These precedents inform us of the extent of the struggle to preserve liberty and to relieve those in civil life from military trials. The founders of our government were familiar with the history of that struggle; and secured in a written constitution every right which the people had wrested from power during a contest of ages. By that Constitution and the laws authorized by it this question must be determined. *The provisions of that instrument on the administration of criminal justice are too plain and direct to leave room for misconstruction or doubt of their true meaning.* Those applicable to this case are found in that clause of the original Constitution which says, 'That the trial of all crimes, except in case of impeachment, shall be by jury'; and in the fourth, fifth and sixth articles of the amendments. The fourth proclaims the right to be secure in person and effects against unreasonable search and seizure; and directs that a judicial warrant shall not issue 'without proof of probable cause, supported by oath or affirmation.' The fifth declares 'that no person shall be held to answer for a capital or otherwise infamous crime unless on presentment by a grand jury, except in cases arising in the land or naval forces, or in the militia,

when in actual service in time of war or public danger; nor be deprived of life, liberty or property without due process of law.' And the sixth guarantees the right of trial by jury, in such manner and with such regulations that with upright judges, impartial juries and an able bar, the innocent will be saved and the guilty punished. It is in these words: 'In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.' These securities for personal liberty thus embodied, were such as wisdom and experience had demonstrated to be necessary for the protection of those accused of crime. And so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication, that when the original Constitution was proposed for adoption it encountered severe opposition; and but for the belief that it would be so amended as to embrace them it would never have been ratified.

Time has proven the discernment of our ancestors; for even these provisions, expressed in such plain English words, that it would seem the ingenuity of man could not evade them, are now, after the lapse of more than seventy years, sought to be avoided. Those great and good men foresaw that troublous times would arise, when rulers and people would become restive, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril, unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future."

71 U. S., 119–120.

And further:

"It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of his will; and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.

If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.

The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the 'military independent of and superior to the civil power'—the attempt to do which by the King of Great Britain was deemed by our fathers such an offense that they assigned it to the world as one of the causes which impelled them to declare their independence. Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.

This nation, as experience has proved, cannot always remain at peace, and has no right to expect that it will always have wise and humane rulers, sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occu-

> pied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate. If our fathers had failed to provide for just such a contingency, they would have been false to the trust reposed in them. They knew--the history of the world told them—the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell, and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen. For this and other equally weighty reasons, they secured the inheritance they had fought to maintain by incorporating in a written constitution the safeguards which time had proved were essential to its preservation. *Not one of these safeguards can the President, or Congress, or the Judiciary disturb, except the one concerning the writ of habeas corpus.*"

The decision of this Court in the Milligan case is in accord with the well-settled law.

In the period of reconstruction, as it is called, which followed the civil war of 1861-'65, a condition existed, or was assumed to exist, which caused Congress to provide for vacating the gubernatorial offices in several of the Southern States and filling them by appointments of the President.

In these States strong military bodies were stationed and general officers of the Army took command. But they enforced *the laws found on their statute books* and also *the laws of the United States.* All the civil officers in those sovereign States were required to obey the commands of those Army officers. The military force was employed actively in the enforcement of the civil laws, and placed in full supremacy over the civil authority.

It was in speaking of the appointment of one of these provisional governors that Chief Justice Chase said that the President might, as Commander-in-Chief, take measures to institute temporary gov-

ernments in insurgent districts occupied by the national forces, or take measures in any state for the restoration of the national authority,

> "employing, however, *only such means and agents as were authorized by constitutional laws.*"

If in the exercise in the United States of his power as Commander-in-Chief the President is by the Constitution limited in time of civil war, and thereafter until the authority of the government is re-established to measures within the constitution, it is plain that he can have no greater power under the Constitution in places, foreign or domestic, where absolute peace prevails.

VI.

It may be that the case of *In re* Ross, 140 U. S., 462, will be supposed to lend color to the theories of the government.

It was there held that a trial in our Consular Court in Japan for a murder committed by an American citizen in Japanese territory need not be by a jury. But the case was decided upon the ground that the crime was an offense against Japan and was committed without the territory of the United States. This court held that our government was established for the United States and not for countries where our constitution has no operation. The authority exercised by our Consul was derived not from the constitution and laws of the United States, but from the government of Japan, being a delegation to him of its sovereignty, ratified and accepted by the treaty between the United States and Japan.

The validity of the treaty stipulation was admitted as flowing from the antiquity and universality of the principles which has from time immemorial recognized the necessity of clothing our consuls with judicial authority in barbaric or semi-civilized coun-

tries, where it would be impossible to obtain a competent grand or petit jury.

To have held that a trial by jury was essential in such cases would have defeated the main purpose of investing the consul with judicial authority (p. 465), and "would, in a majority of cases, cause an abandonment of all prosecution" (p. 464).

These conditions were, of course, known to the framers of our Constitution, and provisions such as those incorporated in our treaty with Japan (and with other nations) were plainly within the treaty making power.

But in the performance of the functions thus conferred upon them, our consuls do not exercise the judicial power of the United States, but of authority delegated to them by the foreign nation, which our treaty making power has permitted them to accept.

As Mr. Justice Field said in the Ross case:

> "The Constitution can have no operation in another country. When, therefore, the representatives or officers of our Government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other."

It may be argued that to permit jury trials in Cuba, in the existing conditions in that island, would be obviously repugnant to the spirit of the Constitution, since the President having determined that the inhabitants of Cuba are as yet incapable of self-government, the courts must deem them unfit to serve as jurors in cases involving the lives and liberties of our citizens. This argument might, perhaps, be resorted to in semi-barbarous localities where the United States had been forced to set up a temporary military government in order to protect American interests. In such a case the spirit of the Constitution would prevail over its letter.

Whitney *vs* Robertson, 165 U. S., 274.

But—

> "the case being within the words of the rule, must be within its operation likewise, unless there be something in the literal construction so obviously absurd or mischievous, or repugnant to the general spirit of the instrument, as to justify those who expound the Constitution in making it an exception."
>
> Chief Justice Marshall, in Dartmouth College *v.* Woodward, 4 Wheat., 644.

In view of the incidents attending our intervention in the war between Spain and Cuba, and of the facts as we have shown them to exist, we do not believe that this Court will say that an observation in Cuba of the rights, privileges and immunities guaranteed by our Constitution to persons accused of crime, would be "obviously absurd, mischievous or repugnant to the general spirit of the instrument."

But in any event the principles underlying the Ross decision have no possible application to the case at bar. While the Government may contend that the Military Governor of Cuba is exercising an authority which it must be assumed has been delegated to him by the Cuban people, neither the treaty making power, nor any act of the national legislature or other competent governmental authority in the United States has empowered him to accept such authority.

Upon what ground then can the President justify the system which he has established in Cuba? What principle of law, under our Constitution, is it which permits him to deny to persons accused of crime in Cuba the rights conferred by the Constitution upon all such persons in every place where any of the powers which it confers upon the executive can be exercised under its authority?

We submit with great confidence that no situation can justify so radical a departure from the spirit and principles of our Constitution.

SEVENTH. — The doctrine under which the courts will sometimes refuse to inquire into the legality or method of organization of certain kinds of *de facto* governments, or governments "by paramount force," has no application to the case at bar.

The appellant is detained against his will under color of an Act of Congress, the enforcement of which will, if our position is sound, result in his transportation to a foreign country, where the President is now, in defiance of the Constitution, maintaining a military dictatorship.

If surrendered, the appellant will be prosecuted without indictment by a grand jury. He will be tried without a jury, and without any of the safeguards guaranteed by our Constitution.

The appellant contends that these provisions of the Constitution are operative in every place where the Executive asserts his power, since the power itself has no power except the Constitution itself.

This view did not commend itself to the learned Judge below. After showing that the decision of this Court in the Milligan case was "not at all in point," he said:

> "But there is no suggestion here that if remanded to Cuba, Neely will be tried by a court martial, or otherwise than by a civil court, following *the same procedure as that prevailing before the concession of Cuba's independence*. And indeed, *if the criminal laws of the island be enforced solely by courts-martial, that circumstance would not be a sufficient answer to request for extradition;* having chosen the country in which to commit the crime, *he must accept the tribunals which administer its laws.*"
>
> Judge Lacombe's Opinion, p. 5.

The inference from this language is that to the learned Judge's mind the question of the legality of

the tribunals which the President has established in Cuba, or the constitutionality of the procedure therein followed was of no consequence whatever. It being conceded that there is a government *de facto* in Cuba of some kind, the appellant can be constitutionally required to submit to its methods, regardless of what those methods are, and regardless of the fact that that government is being maintained by the President of the United States.

We submit that the learned Judge has fallen into error.

The doctrine of *de facto* governments, or "governments by paramount force" goes no further than to overlook or disregard the means whereby a government existing in fact had its origin.

It has, of course, no application to cases where the fact of the existence of, or of the legality of the acts of a *de facto* government maintained *by the United States itself*, or its representatives, civil or military, is directly and properly brought into question

It may be conceded, and we do readily concede, that the military establishment originally set up by the President in Cuba before the Treaty of Paris was concluded was the *de facto* government of that island, and the only power exercising governmental powers there, and that it has ever since continued to be such.

This, however, does not carry with it the further and entirely different concession that the acts and proceedings of the United States officials who conduct that government, or any of them, have been legal, or to any extent warranted by the Constitution of the United States.

The appellant's position is similar to that of the petitioner in the Milliken case. He is seeking to avoid a trial under a system which violates the Constitution, just as Milliken successfully invoked the jurisdiction of this Court to set aside and annul a trial held in violation of that instrument.

EIGHTH.—The act is also unconstitutional because it is based upon a condition which must be quite ineffectual.

The act provides that "the authorities in control "of such foreign country or territory *shall secure* "*to such person a fair and impartial trial.*" The intention of this clause was plainly to guarantee to every person extradited a fair and impartial trial. It is an integral part of the act, and it cannot be said that the act would have been passed without its presence. Congress assumes to authorize the extradition of persons from this country to Cuba only under the sanction of this guarantee that they shall have justice done them. If, in fact, it is quite impossible for this country to redeem a promise so made, it seems obvious that the whole act must fall.

Plainly it would not be possible for this government to see to it that extradited persons are fairly tried in Cuba. As well might they guarantee that a person extradited to England, or any other independent country, should receive a fair trial, for, as we have seen, our military authorities are beyond the control of the legislative and judicial branches of our government, and neither can dictate to the Military Governor of Cuba the manner in which he shall conduct judicial proceedings or what form of procedure he shall employ in any given case.

NINTH.—The unconstitutionality of the present government in Cuba being established, the extradition act must fall with it.

The act enables the President to seize the person of an American citizen in this country through the requisition of his Military Governor, make a *prima*

facie case against him through the same instrumentality, order his return to Cuba through his Secretary of State, and try him in Cuba, without indictment or jury, in a court constituted by his Military Governor, which is himself, and composed of judges whose official lives are dependent upon his pleasure.

The illegality of the system being established to subject any one to its power would be to deprive him of the rights, privileges and immunities guaranteed by the Constitution.

TENTH.—If the political branch of the Government has not determined the status of the Island of Cuba as that of a free and independent people, or has by the Treaty of Paris, or otherwise, asserted the sovereignty and dominion of the United States in that Island, then Cuba is not a "foreign territory" within the meaning of the Act of June 6, 1900.

If the approval of the joint resolution and the further executive action taken by the President pursuant to it, did not constitute a recognition of Cuban independence, or in any manner affect the status of that Island, then this court must assume that it continued to be Spanish territory throughout the war, or until some act of the Executive or of the political branch of our Government wrought a change in that regard.

It may be argued that the joint resolution was merely in the matter of an expression of the hope of future independence for the Cubans, and a means of clothing the President with authority to forcibly aid in the accomplishment of that end, and that the President's approval of the measure really amounted

to nothing more than to evidence his concurrence in the legislative sentiment and the policy of humantarian interference which it proclaimed and authorized him to pursue.

It may also be argued that even though the incidents following the passage of the joint resolution constituted an actual recognition of Cuban independence by the President at that time, the succeeding events culminating in the conclusion and ratification of the Treaty of Paris effected a complete reversal and nullification by the political branch of the Government's former determination.

If either of these views is sound, then, plainly, the Island of Cuba cannot be regarded as "foreign territory" within the meaning of the Act of June 6, 1900, and the appellant should be discharged from custody for that reason.

But this court, in view of the history of the events which brought about the recent war, of the avowed unselfish policy and purely benevolent motives which inspired our intervention and the joint action with our Cuban allies which resulted, and of our repeated disavowal of any intention to profit by the defeat of Spain, will not be slow to accept either of these theories.

To do so would be to determine that the result of the war was to vest in the United States sovereignty and dominion over and title to the Island of Cuba.

(*a*.) If Cuba is not a free and independent power, but continued to be a Spanish colony until the termination of the war, then it may be that our executive was justified in treating it as enemy's territory.

In that case there is no escape from the conclusion that it must be regarded as property or territory belonging to the United States.

The military arm of our government deals with our enemies' territory as property. Such territory is lawful prize of war.

If our military occupation of Cuba was that of a

conqueror of enemy territory it must follow that Spain's relinquishment of all claims of sovereignty over and title thereto vested sovereignty over and title to the island in the United States.

It certainly must be in some one. It is not in Spain. It is not in Cuba if Cuba is not a power. It is, then, in no power but the United States.

(*b.*) Obviously this must equally be the case if by the conclusion and ratification of the Treaty of Paris the United States asserted and assumed the right to exercise sovereignty and dominion over that island, regardless of whether sovereignty and dominion were permanently undertaken, or as a mere temporary expedient, and regardless of whether at any time before the treaty the United States had recognized the independence of the Cuban people.

(*c.*) The facts must be plain before this Court will say that the United States has been guilty of such a breach of faith as the acquisition of Cuba in either manner would constitute.

President McKinley in his message of December 6, 1897, said:

> "There is no desire on the part of our people to profit by the misfortune of Spain. We have only the desire to see the Cubans prosperous and contented, enjoying that measure of self-control which is the inalienable right of man, protected in their right to reap the benefit of the exhaustless treasure of their country."
>
> President McKinley's First Annual Message, December 6, 1897.

Again:

> "Of the untried measures there remain only: Recognition of the insurgents as belligerents; recognition of the independence of

> Cuba; neutral intervention to end the war by imposing a rational compromise between the contestants, and intervention in favor of one or the other party. I speak not of *forcible annexation*, for that cannot be thought of. That, by our code of morality, would be *criminal aggression*."
>
> *Ibid.*

So that there might be no misunderstanding as to our attitude, the joint resolution declared:

> *Fourth.*—That the United States hereby disclaims any disposition or intention to exercise sovereignty, jurisdiction or control over said Island, except for the pacification thereof, and asserts its determination, when that is accomplished, to leave the government and control of the Island to its people."

In his annual message of December 5, 1899, President McKinley said:

> "The pledge contained in this resolution is of the highest honorable obligation, and must be sacredly kept."

While the Treaty of Paris effected a cession of Porto Rico, the Phillipines and Guam, the American commissioners naturally refused to accept a cession of Cuba. They did more than this, they refused to admit that Spain possessed sovereignty over, or title to, the Island. This is obvious from the language of the treaty. Spain did not surrender her sovereignty or title. She merely "relinquished" her *claim* of sovereignty over, and title to, the Island.

During the negotiations the Spanish commissioners were distinctly advised of the exact position of this government:

> "Not having taken up arms for its own advancement, having refrained from acquiring sovereignty over Cuba, the United States now seeks to attain a peace consistent with its ends and purposes in waging war. * * * Its

relations to Cuba have been those of a people suffering without reward or the hope thereof."

Treaty and Protocols, p.

The pacification of the island was practically accomplished when the treaty was signed, on the 12th of December, 1898. It certainly was pacified at the time of the evacuation of the island by the Spanish troops, so that after that time there was no occasion for the exercise of the sovereignty, jurisdiction or control contemplated by the joint resolution.

"The withdrawal of the authority of Spain from the island of Cuba was effected by the 1st of January, so that *the full re-establishment of peace* found the relinquished territory held by us in trust for the inhabitants," &c.

President McKinley's Message of Dec. 5, 1899.

(*d.*) If, in view of these repeated avowals, the United States did nevertheless assume sovereignty or dominion over Cuba after its pacification had been accomplished this Government has placed itself in a very unenviable position before the world.

Said George Washington in his farewell address:

"I hold the maxim no less applicable to public than to private affairs, that honesty is the best policy."

Sparks' Washington, Vol. XII., p. 214.

Commenting upon the unwarranted action of the American Minister at Honolulu in causing a detachment of armed marines from the *Boston* to land on pretext of protecting American life and property, but really in aid of a movement against the then existing monarchy, and as a result of which the Hawaiian government was in January, 1893, in fact overthrown, President Cleveland said:

"Our country was in danger of occupying the position of having actually set up a

> temporary government on foreign soil for the purpose of acquiring through that agency territory which we had wrongfully put in its possession. The control of both sides of a bargain acquired in such a manner is called by a familiar and unpleasant name when found in private transactions. * * * It has been the boast of our Government that it seeks to do justice in all things without regard to the strength or weakness of those with whom it deals. I mistake the American people if they favor the odious doctrine that there is no such thing as international morality, that there is one law for a strong nation and another for a weak one, and that even by indirection a strong power may with impunity despoil a weak one of its territory."
>
> *President's Message relating to the Hawaiian Islands, December* 18, 1893.

Speaking of the high standard of honor and morality which it has always been the policy of the United States to apply in its international relations, he said:

> "On that ground it cannot allow itself to refuse to redress an injury inflicted through an abuse of power by officers clothed with its authority and wearing its uniform; and on the same ground, *if a feeble but friendly State is in danger of being robbed of its independence and its sovereignty by a misuse of the name and power of the United States, the United States cannot fail to vindicate its honor and its sense of justice by an earnest effort to make all possible reparation.*"
>
> *Ibid.*

(*e.*) We repeat, therefore, that the evidence must be very strong before this Court can say that notwithstanding our repeated protests to the contrary, we have in fact made Cuba a part of our own dominion.

We will not discuss the facts upon which the theory of the existence of American sovereignty

in Cuba may be urged. It is sufficient to say that the treaty itself contains many provisions which seem to warrant the claim, and that there are several instances of Congressional legislation also available for that purpose.* We know, moreover, that foreign governments accredit their consular representatives in Cuba to the United States, and that these officials receive their exequaturs from our Secretary of State.

(*f.*) If this court shall decide that the political power has assumed jurisdiction and sovereignty in Cuba, and have made declarations and assertions clearly indicating an intention to treat that Island as within our national authority and dominion, the courts are bound by such governmental acts, and must treat that Island as exclusively within the sovereignty of the United States, and the responsibility of maintaining the national authority as so determined rests with the executive and legislative branches of the government.

Foster *v.* Neilson, 2 Peters, 253, 309.
Williams *v.* Suffolk Ins. Co., 13 Peters, 420.
United States *v.* The James G. Swan, 50 Fed. Reps., 108, 111.

"If those departments which are entrusted
"with the foreign intercourse of the nation,
"which assert and maintain its interests
"against foreign powers, have unequivocally
"asserted its rights of dominion over a coun-

* 30 Stat., 211, increasing the pay of officers and enlisted men serving in Porto Rico, Cuba, the Philippine Islands, Hawaii and Alaska; 30 Stat., 1074, concessions, franchises, &c., not to be granted during military occupation; 31 Stat., 70 (chap. 159), appropriating $30,000 for the relief of American seamen in foreign countries and shipwrecked seamen in Alaska, Hawaiian Islands, Cuba, Porto Rico and the Philippines; 31 Stat., 658 (ch. 797), providing "better facilities for the safekeeping and disbursement of public moneys in the Philippine Islands, and in the Islands of Cuba and Porto Rico," &c.

> " try of which it is in possession and which
> " it claims under a treaty; if the Legislature
> " has acted on the constitution thus asserted,
> " it is not in its own courts that this consti-
> " tution is to be denied."
>
> Chief Justice Marshall in Foster *v.* Neilson, *supra.*

If Cuba is within the sovereignty of the United States it is, of course, not "a foreign territory" within the meaning of the Act of June 6, 1900.

If Cuba is not "a foreign territory," it follows that the act does not authorize the appellant's detention, and he must be discharged from custody regardless of the legality or illegality of the government at present maintained in Cuba.

ELEVENTH.—Neither of the alleged offenses set forth in the complaint, upon which the Circuit Judge issued his warrants, constituted a violation of any of "the criminal laws in force" in Cuba within the meaning of the Act of June 6, 1900.

The statute was evidently intended to confine extradition to the specified offenses, and even then, surrender is only permissible when it is shown that the person charged has "violated the criminal laws in force" in the occupied territory.

In this case two offenses are charged, viz:

(1) A violation of "Chapter X., Article 401 of the Penal Code";
Record, p. 8 (18), p. 11 (23),

(2) A violation of "Sections 37 and 55 of the Postal Code of the said Island of Cuba";
Ibid, p. 9 (21), p. 12 (26).

It being conceded that the President is at present governing Cuba by force of the army under his command, this Court will take notice of the character and origin of the laws which the Military Governor asserts are, in fact, in force in that island.

United States *v.* Philadelphia, 52 U. S., 609.
United States *v.* Perot, 98 U. S., 428.
United States *v.* Chaves, 159 U. S., 452.
De Celis' case, 13 Court of Claims Rep., 117.

If he is mistaken in asserting that the laws which this appellant is charged with violating are in operation, or if it is apparent that they never had any validity, then the appellant is entitled to his discharge.

(*a.*) Referring to a recent translation of the Penal Code of Cuba and Porto Rico, which we assume is the Code upon which the government relies,* we find that Article 401 provides that;

> "The public employee who, by reason of
> "his office, has in his charge public funds or
> "property and who should take (or consent
> "that others should take) any part there-
> "from shall be punished"—

with the penalty of "*presidio mayor*" if the amount taken "exceeded 6,250 and did not exceed 125,000 *pesetas*" (p. 85).

And—

> "In every instance, with a penalty ranging from temporary especial disqualification,

*The Penal Code of the Islands of Cuba and Porto Rico, Translated into English, with Explanatory Notes and a Glossary of Spanish Terms. La Propaganda Literaria, Havana, October, 1898.

in its maximum degree, to perpetual absolute disqualification."

By turning to Article 24 we find that "*presidio mayor*" is an "exemplary punishment" ("*penas aflictives*"), in which category are also included "perpetual absolute disqualification," "temporary absolute disqualification," "perpetual especial disqualification" and "temporary especial disqualification." The result of "absolute" disqualification are defiined in Article 30. Article 24, however, explains that "especial" disqualification is "from public office, the right of suffrage, active and passive, profession or trade."

Article 27 provides that the penalty of *presidio mayor* "shall last from six years and a day to twelve years."

Article 56 declares that—

> "The penalty of *presidio mayor* shall carry along with it those of temporary absolute disqualification in its fullest extent, and subjection to surveillance of the authorities for a period equal to that of the principal penalty, which shall begin to be reckoned from the completion of the same."

This Code was promulgated by a Spanish royal decree in May, 1879. It was a revision of the Penal Code of 1870.

Lloyd McKim Garrison in Harvard Law Review, June, 1899.

From this resulted the provisions regarding treason, "crimes that endanger the peace or independence of the State," "lese-majeste," "crimes against the cortes and its members," "against the Council of Ministers," "against the form of government," "crimes committed by individuals or public func-

tionaries, on the occasion of or against the exercise of, individual rights guaranteed by the constitution," or "in violation of the constitutional provisions relating to religion and worship," "rebellion," "sedition," "criminal attempts against authority and its officers, resistance and disobedience," "acts of disrespect, insults, outrages and threats against its authority, its officers and other functionaries," and "public disorders."

Book II., Title I., Ch. I. & II.; Title II., Ch. I. & II.; Title III., Ch. I.–VI.

> "One deduces from this," says Mr. Garrison "that the Spanish monarchy relies on force for its continuance, since the Code penalizes acts that the patriotic love of a free people would make impossible. * * * Of course these purely political provisions relating to the Crown and Government of Spain fell with the treaty of Cession, and have become mere historical curiosities, like the fateful clause that punished with death as rebels all 'who rise with public and overt hostility' 'to proclaim the independence of the islands of Cuba and Porto Rico, or either of them' (Art. 237)."

Article 7 provides:

> "Crimes that may be penalized by special laws are not subject to the provisions of this Code."

Article 634 declares:

> "All the general penal laws existing prior to the promulgation of this Code are hereby abrogated, excepting those relating to crimes not subject to its provisions."

Book II. treats "of crimes and their penalties."

Title VII. of this book is entitled "of offenses committed by public employees in the course of their employment."

Chapter X. of Title VII. is entitled "of the malversation of public funds," and consists of six articles, 401 (already quoted) to 406.

Considering the source of the Code, its object and its language, can it be reasonably said that an employee of the Department of Posts, established by the United States military authorities, is a "public employee" within the meaning of this section?

Is it not perfectly clear that only employees of the Spanish government were within its contemplation?

It seems to us manifest that a civilian employee of the United States Military establishment in Cuba, holding office under the United States Government, and in no manner subject to the supervision or control of any Cuban authority, cannot be said to be a "public employee" within the meaning of that term as the same was used by the authors of the Code, or within their remotest contemplation.

But in any event, it seems that under a royal decree promulgated in 1882 crimes committed by military or administrative officers cannot be

> "punished *until their superiors have heard the case and turned the offender over to the criminal law for trial.*"
>
> Harvard Law Review, June, 1899, p. 129; Statement of facts enclosed with Mr. J. Estrada Palma's letter to the Secretary of State, December 7, 1895, Appendix A, "Cuba *v.* Spain, 54th Cong., 2d Sess., Senate Report No. 1160, p. 80.

Since the superior officers have not heard the case against this defendant, nor turned him over to the criminal law for trial it is obvious the present proceeding is wholly premature.

(*b.*) The so-called "Postal Code of the Island of Cuba" is without legal force or effect.

The President "has his appropriate sphere of duty, which is to execute, not to make the laws."

Ex parte Milligan, 71 U. S., 121.

Benjamin R. Curtis said in 1862:

> "Besides, all the powers of the President are executive merely. He cannot make a law. He cannot repeal one. He can only execute the laws. He can neither make nor suspend nor alter them. He cannot even make an article of war."

The Postal Code is the act of the President through the Military Governor. If it is without authority under our constitution or laws, it has no force in Cuba, and an alleged violation of its provisions does not constitute a violation of "the criminal laws in force therein."

(*c.*) Since neither the Penal Code of Cuba and Porto Rico, nor the Postal Code apply, and there being no other law in force in Cuba covering the case, it is clear that for this reason and quite regardless of any other consideration the defendant is entitled to his release.

TWELFTH.—Summary of the argument.

1. If by the Act of June 6, 1900, Congress intended to authorize extradition to Cuba during the existence of the present military establishment in that island, the Act is unconstitutional and void, because its enforcement would—

   (*a*) subject accused persons, not in the military service, to the jurisdiction of a purely military government in time of absolute peace.

(*b*) deprive accused persons of the most sacred rights and privileges guaranteed by the Constitution, viz.: indictment, trial by jury, &c.

2. If the act does not authorize extradition to Cuba, then the appellant's arrest and detention is illegal and without authority of law.

CONCLUSION.—The order of the Circuit Court should be reversed, and the cause should be remanded, with directions to discharge the defendant from custody under the warrants issued pursuant to the Act of June 6, 1900.

DeLancey Nicoll,
John D. Lindsay,
Of Counsel for the Appellant.